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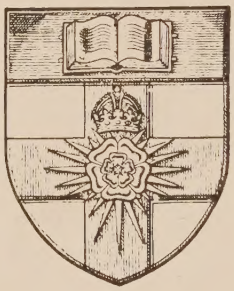

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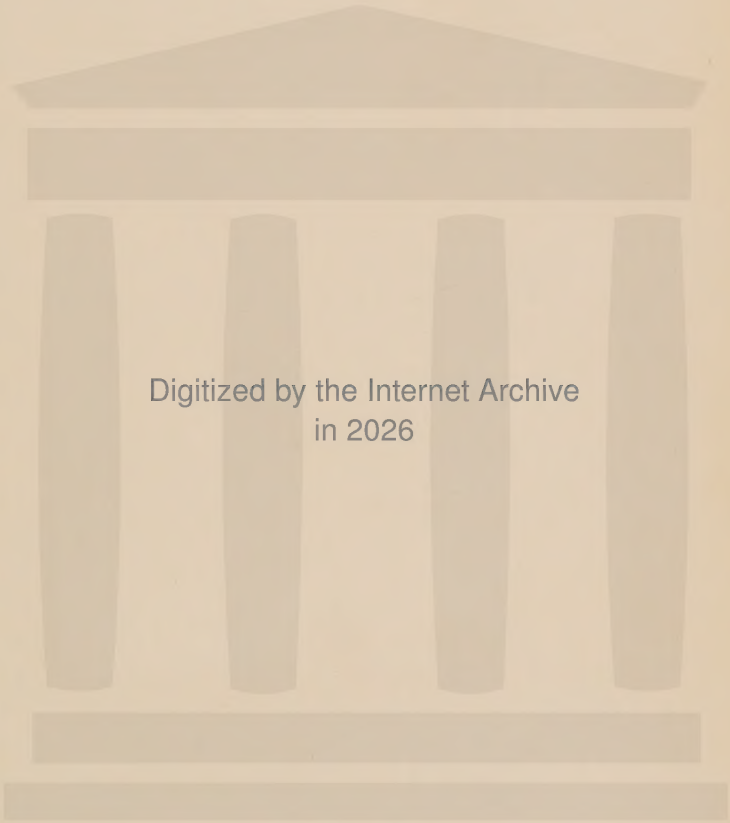
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THE HOUSE OF LORDS

AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

PEERAGE CASES.

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THE RIGHT HONOURABLE SIR HENRY SINGER KEATING, *many years a Judge of the Court of Common Pleas, died at St. Leonards on October* 1, 1888, *at the age of eighty-four.*

ERRATA.

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149 *for* "De Montfort" *read* "De Montmort," and *passim* throughout the case.

183, *line* 13 from the end, *for* "land" *read* "portions of land."

702, *line* 19, *delete* comma after Rutherfurd.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

[HOUSE OF LORDS.]

MILLS AND OTHERS . . . . . APPELLANTS;

AND

ARMSTRONG AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)
1888
Feb. 24.

THE "BERNINA."

Collision—Negligence in both Ships—Damages for Loss of Life—Liability of Owners of one Ship to Passengers and Crew of the other Ship—Maxims, "Qui facit per alium facit per se," "Respondeat superior"—Admiralty Rule as to half Damages in Collisions—Lord Campbell's Act (9 & 10 *Vict.* c. 93), *s.* 1—*Judicature Act* 1873 (36 & 37 *Vict. c.* 66) *s.* 25 *sub-s.* 9.

A collision having occurred between the steamships *Bushire* and *Bernina* through the fault or default of the masters and crews of both, two persons on board the *Bushire*, one of the crew and a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought in the Admiralty Division actions in personam against the owners of the *Bernina* for negligence under Lord Campbell's Act (9 & 10 Vict. c. 93):—

Held, affirming the decision of the Court of Appeal (12 P. D. 58), that the deceased persons were not identified in respect of the negligence with those navigating the *Bushire*; that their representatives could maintain the actions; and could recover the whole of the damages, the Admiralty rule as to half damages not being applicable to actions under Lord Campbell's Act.

Thorogood v. *Bryan* (8 C. B. 115) and *Armstrong* v. *Lancashire and Yorkshire Railway Company* (L. R. 10 Ex. 47) overruled.

APPEAL from a decision of the Court of Appeal, reported as *The Bernina* (No. 2) (1).

(1) 12 P. D. 58.

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The facts appeared in a special case stated for the opinion of the Court in three actions in personam brought in the Admiralty Division against the owners of the steamship *Bernina*, who were the appellants on this appeal.

In September 1884 a collision occurred between the *Bernina* and the steamship *Bushire*, the result of which was that J. H. Armstrong first engineer of the *Bushire*, T. T. Owen second officer of the *Bushire*, and M. A. Toeg a passenger on board the *Bushire*, were drowned. The collision was caused by the fault or default of the master and crew of the *Bernina*, and by the fault or default of the master and crew of the *Bushire*. Armstrong and Toeg had nothing to do with the negligent navigation of the *Bushire*, but Owen was in charge of her at the time and was directly responsible for it.

The three actions were brought by the personal representatives of Armstrong, Owen, and Toeg respectively, to recover damages for their respective deaths.

The questions for the opinion of the Court were (1) whether the defendants were liable for the damages sustained in each case; and (2) if liable, whether they were liable to pay the whole of such damages or only a moiety in each case.

Butt J., on the authority of *Thorogood* v. *Bryan* (1), pronounced that the defendants were not liable in any of the actions (2). The Court of Appeal (Lord Esher M.R. Lindley and Lopes L.JJ.) reversed this decree so far as it concerned the actions by the representatives of Armstrong and Toeg, and pronounced that the defendants were liable in those two actions for the damages proceeded for, and referred the amount to the Registrar; being of opinion that *Thorogood* v. *Bryan* (1) was wrongly decided, and that actions under Lord Campbell's Act, 9 & 10 Vict. c. 93 (such as these were), were not Admiralty actions and were not affected by the Judicature Act 1873 s. 25, sub-s. 9, and that the Admiralty rule as to half damages did not apply to them (3).

Before the Court of Appeal the claim on behalf of Owen's representatives was given up, and the respondents in the appeal to this House consisted only of the representatives of Armstrong

(1) 8 C. B. 115. (2) 11 P. D. 31.
(3) 12 P. D. 58, 83, 84, 95.

and Toeg respectively. The question upon the Admiralty rule as to half damages was mentioned by the appellant's counsel but was not argued before this House.

1887. Dec. 8, 9. Sir *Walter Phillimore* and *J. Gorell Barnes* for the appellants:—

The question is whether the Court of Appeal were right in overruling *Thorogood* v. *Bryan* (1). The principle of that decision is sound. There the plaintiff delegated to the driver of the omnibus the duty of careful driving, and was held to be so far identified with the driver that the driver's contributory negligence prevented the plaintiff from recovering against the proprietor of another omnibus, the plaintiff being injured by the combined negligence of the two drivers. It is admitted that the plaintiff cannot sue when the driver is his own servant and is guilty of contributory negligence. The same result should follow wherever the plaintiff delegates the control of the carriage or vessel. The principle is sound in the case of goods: why is it not so in the case of passengers? Where goods are carried the owner cannot recover against a third person for negligence if the negligence of the carrier or his servants contributes to the accident: *Vanderplank* v. *Miller* (2). If the bailee of goods cannot sue it would be startling to hold that the bailor could.

If the decision below is right, inconvenient consequences will follow. The passenger can sue the *Bernina* for the whole of the damages, though the *Bushire* equally contributed. And if he does not recover all his damages in that action, he can afterwards sue the *Bushire*, or vice versâ. As to the authorities, the principle of *Thorogood* v. *Bryan* (1) has never been departed from, and it has more than once been approved. The Court of Exchequer in *Bridge* v. *Grand Junction Railway Company* (3) had already impliedly intimated an opinion to the same effect. No doubt was thrown upon the principle in *Rigby* v. *Hewitt* (4) or in *Greenland* v. *Chaplin* (5). In *The Milan* (6) Dr. Lushington while disapproving of *Thorogood* v. *Bryan* (1), practically followed it,

(1) 8 C. B. 115.
(2) Moo. & M. 169.
(3) 3 M. & W. 244.
(4) 5 Ex. 240.
(5) 5 Ex. 243.
(6) Lush. 388.

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giving the plaintiff only half his damages, and thus identifying the owner of cargo with the owner of the ship which carried it. In *Armstrong* v. *Lancashire and Yorkshire Railway Company* (1) it was distinctly followed, and the inconveniences of holding otherwise are pointed out by Bramwell B. There the plaintiff was servant to the company owning the train in which he was carried. So in *Child* v. *Hearn* (2). So where the plaintiff was a child in the care of its grandmother whose negligence contributed to the injury: *Waite* v. *North Eastern Railway Company* (3). The principle of that case covers the present. The relationship of master and servant need not exist: all that is necessary for the application of the principle is that the plaintiff surrenders control to the person whose negligence contributes. "When a person commits himself to the care of the employees of a carrier of passengers, to be transported anywhere, he makes them his agents, so far as the use of care to avoid the consequences to him of the negligence of the conductors of any other vehicle on the road is concerned:" per Robertson C.J. in *Mooney* v. *Hudson River Railroad Company* (4).

[They also referred to *Dudman* v. *Dublin Port and Docks Board* (5); and the American cases, *Lockhart* v. *Lichtenthaler* (6); *Little* v. *Hackett* (7) (disapproving *Thorogood* v. *Bryan* (8)); and Shearman and Redfield on Negligence, § 46.]

Bucknill Q.C. (*A. E. Nelson* with him) for the respondents:—

The decision of the Court of Appeal was sound and for the reasons there given. To make the principle of *Thorogood* v. *Bryan* (8) applicable there must be the relationship of master and servant or principal and agent between the passenger and the driver or manager of the conveyance: *Adams* v. *Glasgow and South Western Railway Company* (9).

[They also discussed the authorities cited contra, and referred to *Chartered Mercantile Bank of India* v. *Netherlands India Steam*

(1) Law Rep. 10 Ex. 47.
(2) Law Rep. 9 Ex. 176.
(3) E. B. & E. 719.
(4) 28 New York Sup. Court Rep. 548, 553.
(5) 7 Ir. Rep. Com. L. 518.
(6) 46 Penn. 151.
(7) 9 Davis Supr. Ct. U.S. 366.
(8) 8 C. B. 115.
(9) 3 Court Sess. Cas. 4th Series, 215.

Navigation Company (1); and the American cases, *Wabash, St. Louis and Pacific Railway Company* v. *Shacklet* (2) and *Borough of Carlisle* v. *Brisbane* (3).]

J. Gorell Barnes replied.

The House took time for consideration.

1888. Feb. 24. LORD HERSCHELL:—

My Lords, this appeal arises upon a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives, and who, it is alleged, lost their lives through the negligence of the appellants.

The appellants are the owners of the steamship *Bernina*, between which vessel and the steamship *Bushire* a collision took place, which led to the loss of fifteen persons who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the *Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the *Bushire*.

The question arises whether, under these circumstances, the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a primâ facie case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor, again, do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts, as, e.g.,

(1) 10 Q. B. D. 521.
(2) 44 American Rep. 791.
(3) 57 American Rep. 483, and 488, see note by reporter.

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the relation of master and servant, or employer and agent acting within the scope of his authority. But they rest their defence solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence, without which the disaster would not have occurred. In support of the proposition that this establishes a defence they rely upon the case of *Thorogood* v. *Bryan* (1) which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for revision before a Court of Appeal until the present occasion. That action was one brought under Lord Campbell's Act against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the kerb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The learned judge directed the jury that "if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases—notwithstanding the defendant, by her servant, had been guilty of negligence—their verdict must be for the defendant." The jury gave a verdict for the defendant, and the question was then raised, on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The Court held that it was.

It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman J. said: "It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care of the driver will be a defence of the driver of the carriage which directly caused the injury." Maule

(1) 8 C. B. 115.

and Vaughan Williams JJ. also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself: "I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." Vaughan Williams J. said, "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master: though if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognised principles of law, or has any other effect than to furnish that defence, the validity of which was the very point in issue. Two persons may no doubt be so bound

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together by the legal relation in which they stand to each other, that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle, and the driver of it, certainly is not such as to fall within any of the recognised categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given for the judgment in *Thorogood* v. *Bryan* (1). Maule J. says: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. . . . But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust."

I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring.

The only other reason given is contained in the judgment of Cresswell J. in these words: "If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a

(1) 8 C. B. 115.

case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood* v. *Bryan* (1) was founded, and I entirely agree with the learned judges in the Court below in thinking them inconclusive and unsatisfactory.

I will not detain your Lordships further on this part of the case, beyond saying that I concur with the judgments of the learned judges in the Court below, and specially with the very exhaustive judgment of the Master of the Rolls.

It was suggested, in the course of the argument, that *Thorogood* v. *Bryan* (1) might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defence on the merits if the facts had been properly averred. If by a collision between two vehicles a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, "I am not guilty, because but for the negligence of another person the accident would not have happened." And I do not see how this defence is any more available as against a person being carried in one of the vehicles, unless the reasoning in *Thorogood* v. *Bryan* (1) be well founded.

I have said that the decision in *Thorogood* v. *Bryan* (1) has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate examination to which they have been subjected by the Master of the Rolls. The result may be summarised thus: The learned editors of Smith's Leading Cases, Willes and Keat-

(1) 8 C. B. 115.

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ing JJ., strongly questioned the propriety of the decision (1). Parke B., whose dictum in *Bridge* v. *Grand Junction Railway Company* (2) Williams J. followed in directing the jury in *Thorogood* v. *Bryan* (3), appears to have doubted the soundness of the judgment in that case. Dr. Lushington in *The Milan* (4) expressed strong disapproval of it; and though in *Armstrong* v. *Lancashire and Yorkshire Railway Company* (5) it was followed, and Bramwell and Pollock BB., to say the least, did not indicate dissatisfaction with it, I understand that my noble and learned friend, Lord Bramwell, after hearing this case argued, and maturely considering it, agrees with the judgment of the Court below. In Scotland the decision in *Thorogood* v. *Bryan* (3) was pronounced unsatisfactory, in *Adams* v. *Glasgow and South Western Railway Company* (6). In America it has been followed in the Courts of some States, but it has often been departed from, and upon the whole, the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is *Little* v. *Hackett* (7). That was a decision of the Supreme Court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. Field J., in delivering judgment, examined all the English and American cases, and the conclusion adopted was the same as that at which your Lordships have arrived.

I have only this observation to add. The case of *Waite* v. *North Eastern Railway Company* (8) was much relied on in the argument for the appellants; but the very learned counsel who argued that case for the defendants, and all the judges who took part in the decision, were of opinion that it was clearly distinguishable from *Thorogood* v. *Bryan* (3), and did not involve a review of that case. I think they were right.

As regards the other questions raised, I have only to say that I think they were properly dealt with by the Court below.

I am requested by my noble and learned friend Lord Bramwell, who was unable to remain to read the opinion which he had

(1) See notes to *Ashby* v. *White*.
(2) 3 M. & W. 244.
(3) 8 C. B. 115.
(4) Lush. 388.
(5) Law Rep. 10 Ex. 47.
(6) 3 Court Sess. Cas. 4th Ser. 215.
(7) 9 Davis Supr. Ct. U.S. 366.
(8) E. B. & E. 719.

prepared, to state that he concurs in the motion which I am about to make (1).

I move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

(1) The opinion prepared by Lord Bramwell was as follows:—

LORD BRAMWELL:—

My Lords, these cases are to me cases of extreme difficulty. They are supposed to involve the same question as, and no other than, that in *Thorogood* v. *Bryan* (8 C. B. 115). I do not think so. I am reported, I have no doubt accurately, to have made some observations on that case; but I can safely say, and it will be seen that I can consider those before us "loyally," to use an expression of Lord Esher, and unbiassed by anything I may have said before. Whether it was that that case could be, or might be supported, is immaterial. I think it was rightly decided, though not decisive of the case before us. The plaintiff there was administratrix of a passenger in an omnibus, who lost his life, we must take it, through the negligence of the driver of the omnibus in which he was a passenger, and the negligence of the driver of an omnibus belonging to the defendant. The negligence of the two drivers was not a joint act; the negligence of one was not the negligence of the other; each was separately guilty of an act of negligence, and the two acts caused the passenger's death. The plaintiff's case was, as stated in the declaration, that the defendant by her servant so carelessly drove and directed the carriage and horses, that, by the negligence and improper conduct of her servant in that behalf, they ran against the deceased and knocked him down, &c., and, by reason of the premises, he died. The plea was "not guilty"—i.e., that the deceased was not struck and killed by the negligence of the defendant's driver. That that is the meaning of the plea is shewn by what was said in *Bridge* v. *Grand Junction Railway Company* (3 M. & W. 244). It was for the plaintiff to prove that the deceased was killed by a negligent act in the defendant's driver; he did not prove it by shewing he was killed by such negligent act, and by a separate negligent act in the driver of the omnibus in which the deceased rode. As I have said, he was killed not by a joint act of negligence by two persons, but by two separate acts of negligence of those two. If the owner of the omnibus in which the passenger was, had sued the defendant, and had said in his declaration, as he would have done, that by the defendant's negligence his, the plaintiff's omnibus, was damaged, he would have failed to prove it if there were contributory negligence of his own driver. The plea would have been not guilty; but if not guilty to such a declaration raised the defence of, "You say I did it; I did not, for without your negligence it would not have happened"—if it raised, I say, the defence in one case, so it would in the other, viz., the case of the passenger. I hope I speak with no undue confidence, but I had many years practice in special pleading, happily abolished, and have not a doubt that the declaration in *Thorogood* v. *Bryan* (8 C. B. 115) was not proved. It was not by and through the defendant's negligence the passenger was killed. If there had been nothing but that negligence the man would not have been killed. If he would have been, then the other negligence was

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not contributory. This is the ground on which I have thought *Thorogood* v. *Bryan* (8 C. B. 115) was rightly decided. It is true it is not so put by the Court. The expression they use is that the passenger was identified with the omnibus that carried him. Whether that is a right expression may be doubtful. I shall have to examine it further on. At present I will only observe that the four judges were great lawyers, and I believe that an experienced lawyer may be, as it were, instinctively right without at the moment being able to give a good reason for his opinion.

I confess that at the commencement of the argument of the present cases I thought this consideration decided them, but I am now satisfied that it does not. It is obvious that my opinion that *Thorogood* v. *Bryan* (8 C. B. 115) was rightly decided turns on a question of pleading, viz., that the plaintiff alleged that the defendant's negligence caused the injury, which was not proved. But in the cases before us there are no pleadings, and we must see whether the facts shew a cause of action against the appellants. Now the facts are different as to the two cases. In one the plaintiff's case is, I was a passenger in the *Bushire*; that vessel contracted to carry me without negligence, they failed—broke their contract; you were owner of another vessel, it was your duty towards the public to navigate without negligence; by your breach of duty and the breach of contract in the *Bushire*, I was injured, and claim damages of you. The case of the engineer of the *Bushire* differs from this, for he could not say that the owners contracted to carry him safely, because he undertook the risk of negligence in fellow servants. But I suppose he might say that there was a duty to him in the other sailors to be careful in the performance of their share of the navigation. I have used the word "negligence," but suppose there was no negligence nor want of skill, but only an error of judgment. The outside public, I suppose, might rely on that. But could a fellow servant? I doubt it extremely.

These, then, are the facts of the cases. Take that of the passenger first. Is it a good cause of action to say, I was passenger in a ship, the owners of which had agreed with me that their ship should be navigated with care, skill, and judgment; you were owner of another ship, by your negligence and their negligence or want of skill or error of judgment which contributed to it, and without which it would not have happened, there was a collision, and I was injured; I may maintain an action for the damage against them, but I prefer to sue you. Is this a good statement of claim? Is a good cause of action shewn? The language of the judges in *Thorogood* v. *Bryan* (8 C. B. 115) says, "No." I have been unable to think of any other possible case in which a man could be successfully sued for an act which would have caused no injury to the plaintiff, except for another act in breach of a contract with the plaintiff by the man guilty of it, and for which the plaintiff could maintain an action against him. It is clear that the passenger could maintain an action against those who failed in their contract to carry him without negligence. Why should he also be able to maintain one against the defendants? Without the negligence of the servant of the man who had contracted to carry him safely, there would have been no collision—no damage. The servant of the carrier of the plaintiff contributed to it. He has therefore helped the plaintiff to a cause of action, helped to cause the

damage; but the whole damage is to be paid by the defendant. Can that be? Further, if the passenger can maintain the action why cannot the owner of the carriage for injury to it? I know it was said during the argument that there was no case where an action had been maintained by a man who was responsible for the act of his servant in respect of an injury to the causing of which his servant had contributed. That is true, but why, unless on principles that justify the decision in *Thorogood* v. *Bryan* (8 C. B. 115)? The maxim qui facit per alium facit per se does not apply. That maxim applies where the tortious act has been commanded by the "se." As for instance, where A. tells B. to beat C., or to build a house such that it will obstruct C.'s ancient lights. It does not apply to a case of negligence. The negligence of the servant is not commanded by the master. It is a breach of duty in the servant to the master. How, then, can he have commanded it? I cannot see why if a passenger can maintain this action, the owner being a passenger and injured, cannot. But I will put another case. Suppose the owner's wife is a passenger and injured, can she maintain such an action? If not, why not? The driver is not her servant, and she is not responsible for his negligence. Take a case a little more remote—a friend of the owner of the carriage; can he maintain the action? If the driver of the omnibus gives a friend a gratis lift, can he maintain an action against the other omnibus, being injured by the combined effect of acts of negligence in each driver of the omnibuses? Does it not seem absurd that if a man hires a carriage for a month, with horses and driver, he and his family and friends may maintain such actions, but not if his own coachman drives? Suppose the horses are jobbed, can the jobmaster maintain such action? If not, again I ask, why not? Further, if the passenger can maintain the action, clearly the owner of goods being carried which are injured by the negligence of the owner and the negligence of a third person conjoined, could maintain an action against the third person, and we should have what seems to me the ludicrous case of a collision between railways A. and B., injury to goods in each, and actions maintainable by owners of goods carried by A. against B., and of goods carried by B. against A., when possibly neither had any remedy against his own carrier. It is to be remembered that the negligence of the driving is not a joint act. There are two several acts of negligence. If judgment is recovered against one of two joint wrong-doers no second action is maintainable against the other. If two men were driving a carriage negligently and damage resulted, if an action was brought and judgment recovered against one, no second action could be maintained against the other. But if a passenger in one omnibus recovered against the owner of another omnibus it is certain he could maintain an action against the owner of the omnibus in which he had been carried. What damages he would recover, if he had received damages, whether recovered or voluntarily given, I will not stop to consider. I cannot see why he should not recover over again. He might say that his transaction with the other omnibus was res inter alios. But supposing he recovered yet did not get paid, he clearly would be entitled to get his damages from the owner of the omnibus in which he was a passenger. Should it be said why of him, who also could say I did not do it, it was the act of another added to mine; the answer would be, "You broke your contract

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with me to drive me with care, and not negligently." But take the case put in argument of injury, not to a passenger but to one of the public by separate acts of negligence in two persons, which acts conjoined caused the injury. This is a case I suggested during the argument in *Armstrong* v. *Lancashire and Yorkshire Railway Company* (Law Rep. 10 Ex. 47). Such a case it is not easy to imagine, but let us suppose it. I should say an action might be maintained against the two jointly. If their conduct was wilful, it clearly might be, and I do not know why its being negligent should make a difference. Let it be remembered that the defence is, I did not do it; my act alone did you no harm; you would not have been damaged but for the default of a man with whom you made a contract, which he broke, and the breach of which made my act a danger and hurt to you. Had you yourself been guilty of the default I should not be liable. Why should I when the default is that of the person you employ while he is acting in that employment?

These considerations are applicable to the passenger. But what about the engineer? I suppose as far as his employer is concerned he could maintain no claim against him; he would be held to have taken the risk of negligence in his fellow servants. But he might perhaps have a valid claim against the fellow servant, and would be met with the same argument as the passenger, viz., "I did not do it, it was the result of two acts—mine and that of the other vessel." It seems impossible to suppose that the engineer, a person employed on the vessel, would have a better or worse case than the passenger. Further, it must be remembered that the cause of the damage may be, not negligence, no breach of duty, but error of judgment in one driver, and negligence of the grossest kind in the other. Is the former to be liable for all the damage?

These considerations seem to me of great weight, and raise difficulties that will have to be faced, but I will examine those on the other side. A plaintiff in a case like these says truly, you, the defendant, or your servants, were guilty of a breach of your duty to the public. You drove or navigated negligently on the highway or high seas where I had a right to be. If not precisely the cause, or sole cause of the harm that befell me—if not the causa causans—your tortious act was the cause without which I should not have sustained harm. Why am I to seek further or prove more? Perhaps some one else is liable to me. How does that affect my right to complain of you? You are a wrongdoer. Suppose the other wrongdoer is insolvent or dead. You complain that you will be made liable for damage that you have only in part caused; but if you succeed you will pay no part of that damage. You have no right to be heard to confess you are a wrongdoer and yet contend there is no liability. If you had done wilfully what you did, that is, if you had wilfully driven hazardously, hoping the other driver would have avoided you, there could be no doubt of your liability. But in point of law there is no difference between liability for wilfulness and for negligence or want of skill. Perhaps the suggested hardship of a part causer of the damage being made liable for the whole may be met by holding that he is not, that the right of action against the other lessens the damages against the one. These last arguments have prevailed with me. The defendant is a wrongdoer; damage has resulted to the plaintiff which would not have resulted but for such wrongdoing. The plaintiff is not concerned with dif-

ficulties and hardships beyond his own. I think, therefore, that the judgment must be affirmed; but I cannot say confidently.

As to the authorities, *Thorogood* v. *Bryan* (8 C. B. 115) was decided by a very strong Court. They decided it on principle, and not on the pleadings. The expression used by them, "identified," is not satisfactory, but it represents and conveys an idea, I believe, the same as that which I have elaborated, viz., the defendant's act, or default, did not cause the damage. It was preceded by *Bridge* v. *Grand Junction Railway Company* (3 M. & W. 244), which points in the same direction. So, also, in *Vanderplank* v. *Miller* (Moo. & M. 169) which I think plain enough. There is also the case of *Armstrong* v. *Lancashire and Yorkshire Railway Company* (Law Rep. 10 Ex. 47), which, as Lord Justice James used to say of himself, is an authority, though I joined in the decision. There is also the case of *Waite* v. *North Eastern Railway Company* (E. B. & E. 719), where the child could maintain no action, because, as Lord Campbell said, "it was so *identified* with its grandmother," who was carrying it. It is true he offered no opinion on *Thorogood* v. *Bryan* (8 C. B. 115), and such cases, but I cannot see the difference. As to the judgments in the Courts below, they have not, I consider, dealt with the question that I have elaborated, viz., Is the defendant guilty; did he cause the mischief? The Master of the Rolls argues: "If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident," the person injured can maintain an action for all the damages occasioned to him against either wrongdoer. Can he? If so there is an end of the matter. Can he, when his claim against one is for breach of contract and against the other for a tort? Can he, where he is a gratuitous passenger in a carriage of one wrongdoer? Lindley L.J. says, speaking of *Armstrong* v. *Lancashire and Yorkshire Railway Company* (Law Rep. 10 Ex. 47), "if the proximate cause of the injury was the combined negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company, or, in other words, to be without a remedy." With submission this is a mistake. If the plaintiff could maintain no action against his own company, it was because he had not bargained for care on their part, and they had done him no wrong. Lopes L.J. is very hard on *Thorogood* v. *Bryan* (8 C. B. 115), and says, "the theory of identification is a fallacy and a fiction, contrary to sound law and every principle of justice," and that the passenger may maintain an action against either wrongdoer, or "*both*." With great respect I venture to doubt the last statement. The judges, then, have not dealt with the question I have stated. Whether it did not occur to them, or was not thought worthy of notice, I know not. The same may be said of the American cases. As to what Parke B. said, I set the greatest value on everything from him, but his respect for Willes J. would make him query anything that that learned judge queried. I may be permitted to meet this original style of authority by another, and of the same kind, and say that he, Lord Wensleydale, once told me of a reported decision that he had written "wrong" against it, which he would have done against *Thorogood* v. *Bryan* (8 C. B. 115) if he had thought it so.

I am not much helped by the autho-

H. L. (E.) 1888 MILLS v. ARMSTRONG. THE "BERNINA."

LORD WATSON :—

My Lords, the appellants conceded in argument that unless it can be shewn that *Thorogood* v. *Bryan* (1) is a valid precedent they cannot succeed in this appeal. Although nearly forty years have elapsed since that case was decided, I think the rule which it established must still be dealt with upon its own merits. The decision has not met with general acceptance, and it cannot be represented as an authority upon which a course of practice has followed, or upon which persons guilty, or intending to be guilty, of contributory negligence are entitled to rely.

When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others, for the obvious reason that but for his own neglect he would have sustained no harm. Upon the same principle individuals who are injured, without being personally negligent, are nevertheless disabled from recovering damages if at the time they stood in such a relation to any one of the actual wrongdoers as to imply their responsibility for his act or default. That constructive fault, which implies the liability of those to whom it is imputable to make reparation to an innocent sufferer, must also have the effect of barring all claims at their instance against others who are in pari delicto, is a proposition at once intelligible and reasonable. If they are within the incidence of the maxim, "Qui facit per alium facit per se," there can be no reason why it should apply in questions between them and the outside public, and not in questions between them and their fellow wrongdoers. But the facts which were before the Court in *Thorogood* v.

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rities. I will only say that if the proposed judgment is right, for the reasons I gave, *Waite* v. *North Eastern Railway Company* (E. B. & E. 719) was wrongly decided. The abstract question must be decided on principle. I do not pretend to have a confident opinion on it, but I think the judgment right, and should be affirmed. I think so on the ground that in such cases the defendant is a wrongdoer without whose wrongdoing the plaintiff would not have been damaged; that he cannot be heard to say that there is some other wrongdoer who contributed to the damage; that as far as the sufferer is concerned it matters not whether that other wrongdoer was so in a joint or separate act.

(1) 8 C. B. 115.

Bryan (1) do not appear to me to bring the case within that principle.

My noble and learned friend, Lord Bramwell, who is so conversant with the intricacies of English pleading, suggested in the course of the argument a technical ground upon which the decision in *Thorogood* v. *Bryan* (1) might be justified. In that view the case would not be an authority for the appellants, who accordingly supported the ratio assigned for the judgment, which was simply this, that the deceased passenger, by taking his seat on the omnibus, became so far identified with its driver that the negligence of the driver was imputable to him in any question with the driver or owner of the other omnibus, which ran over him and was the immediate cause of his death. Coltman and Cresswell JJ. express themselves in terms which, if literally understood, would lead to the conclusion that he would also have been responsible for damage solely attributable to the fault of the driver. Coltman J. said: "Having trusted the party by selecting the particular conveyance the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence, he must be considered a party to it." Maule J. was careful to limit his observations to the case before him. "I incline to think," said the learned judge, "that *for this purpose*" (i.e. recovering damages from the defendant) "the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased."

I do not think the very eminent judges who decided *Thorogood* v. *Bryan* (1) intended to affirm that the deceased by taking his seat in the omnibus incurred the same responsibility for the negligent acts of the driver as if the latter had been his servant. If they did mean to do so their conclusion might be perfectly logical, but their premises would be directly at variance with the principles laid down in *Quarman* v. *Burnett* (2), which I have always regarded, and still regard, as a sound and authoritative precedent. If they did not, then they have affirmed that a passenger travelling by a public conveyance may be so unconnected with the driver as to be exempt from liability for his negligence,

(1) 8 C. B. 115. (2) 6 M. & W. 499.

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and yet be so identified with him as to lose all right of action against wrongdoers whose negligence, in combination with that of the driver, has occasioned personal injury to himself. That is a proposition which it is very difficult to understand. It must be a singular kind of relationship, and created by very exceptional circumstances, which results in the superior being affected by his inferior's negligence in a question with wrongdoers and not in a question with persons who are themselves free from blame.

It humbly appears to me that the identification upon which the decision in *Thorogood* v. *Bryan* (1) is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am, therefore, unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* (1) rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must, of course, be responsible for the consequences of his interference.

Counsel for the appellants endeavoured to support *Thorogood* v. *Bryan* (1) upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternatively that the maxim "Respondeat superior" does not apply; and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant, or subject to

(1) 8 C. B. 115.

their control, but by reason of their being for the time under his dominion.

Waite v. *North Eastern Railway Company* (1) was the authority relied on in support of this branch of the argument. But there is no analogy between the position of an infant incapable of taking care of itself and that of a passenger sui juris; and the theory that an adult passenger places himself under the guardianship of the driver so as to be affected by his negligence, appears to me to be absolutely without foundation either in fact or law.

I therefore concur in the judgment which has been moved.

LORD MACNAGHTEN:—

My Lords, I concur in the motion which has been proposed, and in the reasons upon which it has been founded.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 24th Feb. 1888.

Solicitors for appellants: *Pritchard & Sons, for Bateson, Bright & Warr, Liverpool.*

Solicitors for respondents: *Lowless & Co.*

(1) E. B. & E. 719.

[HOUSE OF LORDS.]

H. L. (E.) 1887 Nov. 24.

HENRY JAMES STONOR . . . . . APPELLANT;

AND

JOHN FOWLE . . . . . RESPONDENT.

Practice—Imprisonment for Debt—Judgment Summons—Order for Commitment of Debtor—Jurisdiction—Debtors Act 1869 (32 & 33 *Vict. c.* 62) *s.* 5.

Judgment having been recovered against a defendant in a county court an order for payment of £20 was made. The defendant having made default in payment thereof a judgment summons was taken out and the judge having heard evidence and being satisfied as to the defendant's means made an order to commit him to prison for ten days, but directed that the warrant should be suspended if the debtor paid instalments of £4 a month, the first payment to be made in fourteen days.

Held, reversing the decision of the Court of Appeal (18 Q. B. D. 213), that the order was in reality an order for commitment in respect of the past default in payment of the £20, and not an anticipatory order for commitment in respect of any future default; and that this being so the order was valid under the Debtors Act 1869 (32 & 33 Vict. c. 62) s. 5.

APPEAL from a decision of the Court of Appeal reported as *Reg.* v. *Judge of Brompton County Court* (1).

On the 7th of January 1886 the plaintiff in an action of *Reeves* v. *Fowle* recovered judgment for £57 2*s.* 2*d.*, debt and costs, against the defendant in the Brompton County Court, and an order was that day made for payment of the amount by an instalment of £20 on the 21st of January, and the balance on the 21st of February.

The defendant having made default in payment of the first instalment a judgment summons under the Debtors Act 1869 was taken out on the 4th of February. At the hearing of the summons on the 4th of March evidence having been given of the defendant's means and his ability to pay the instalment of £20 payable on the 21st of January in respect of which the summons was issued, the county court judge indorsed the summons thus:—

"C. 10 days.
S. W. £4 monthly.
1st payment in 14 days."

(1) 18 Q. B. D. 213.

In this indorsement "C." meant "commitment," and "S. W." "suspend warrant." The note of the order made at the time by the registrar for his own use was "14 days. £4 a month."

The order was entered by the registrar in the commitment summons book as follows:—"Commitment 10 days: suspended 14 days. Means." No entry was made in the commitment summons book with respect to the payment of £4 monthly.

The March and April instalments of £4 were paid by the defendant, after which nothing more was paid.

In June the defendant's solicitor wrote to the registrar asking for a copy of the order of the 4th of March. The registrar in reply wrote as follows: "Order made 4th March 1886: £4 to be paid 18th March 1886 and each succeeding calendar month. If not so paid warrant of commitment might be issued. The May payment is overdue, the June payment is due to-day." This reply was not signed but was stamped with the seal of the county court.

An order for the arrest and commitment of the defendant was afterwards drawn up and issued. This order was dated the 4th of March 1886 and was in respect of the non-payment of the balance of £20 and 16*s.* costs, after deducting the two paid instalments of £4 each. The terms of this order are sufficiently set out in the judgment of Lord Halsbury L.C.

A summons taken out by the defendant for a writ of prohibition having been dismissed by Pollock B. at chambers, a rule nisi was granted by the Queen's Bench Division for the issue of a writ of prohibition directed to the county court judge and the plaintiff to prohibit them from further proceeding on and putting in force the order of commitment of the 4th of March. This rule was made absolute by Lord Coleridge C.J. and Manisty J. and their decision was affirmed by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ. (1)).

Against these decisions the county court judge now appealed.

Nov. 22, 24. Sir *R. Webster* A.G. and *R. S. Wright* (Sir *E. Clarke* S.G. with them) for the appellant:—

The question is whether the order for commitment of the 4th of

(1) 18 Q. B. D. 213.

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March 1886 was valid under the Debtors Act 1869 sect. 5 (1). Viewed in its true light that was an order in respect of a past default, the non-payment of £20, and was not an anticipatory order for commitment in respect of a future default, the non-payment of the £4 monthly instalment. The direction as to £4 monthly was no doubt made in consequence of a discussion between the judge and the parties as to the ability of the debtor. That direction was no part of the order for commitment, and was never entered or recorded as such by the registrar. It was no more a part of the order than was the registrar's letter. The record makes no mention of the direction to suspend the warrant if £4 monthly were paid: the record only says "commitment ten days: suspended fourteen days." The record alone can be looked at to shew what the proceedings of a Court really were: *Kemp* v. *Neville* (2); *Sintzenick* v. *Lucas* (3); *Green* v. *Alston* (4). No doubt if the order were really an anticipatory order for commitment upon a future default it would be bad, because there would be no adjudication that the debtor had the means of paying that for non-payment of which he was committed: *Andrews* v. *Marris* (5); *Ex parte Kinning* (6); *Kinning's Case* (7); *Ex parte O'Neill* (8); *Abley* v. *Dale* (9); *Dews* v. *Riley* (10); *Davies* v. *Fletcher* (11); *Ex parte Koster* (12). But the order in the present case was not of that nature: it was an order of adjudication that the debtor had had means and had already made default. This entirely gets rid of the difficulty pointed out by Willes J. in the

(1) The Debtors Act 1869 (32 & 33 Vict. c. 62) s. 5 enacts (among other things) as follows: "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court. Provided .... that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

(2) 10 C. B. (N.S.) 523, 547.
(3) 1 Esp. 43.
(4) 1 F. & F. 12.
(5) 1 Q. B. 3.
(6) 4 C. B. 507.
(7) 10 Q. B. 730.
(8) 10 C. B. 57.
(9) Ibid. 62.
(10) 11 C. B. 434.
(11) 2 E. & B. 271.
(12) 14 Q. B. D. 597.

case relied on in the Court of Appeal: *Re Debtors Act* 1869 (1). It resembles a fine imposed for an offence with the qualification that if the defendant be of good behaviour it is not to be enforced. Whether the order be bad or good as against the original plaintiff, the judgment debtor cannot complain of it; it is for his benefit. The power of imprisonment for non-payment was given not merely as a means of enforcing payment but as a punishment for a fraudulent or dishonest debtor: per Jessel M.R. in *Marris* v. *Ingram* (2).

The power to direct payment of a judgment debt by instalments is regulated by the Debtors Act 1869 (32 & 33 Vict. c. 62) s. 5, and by the County Court Rules 1886: Order XXIII. r. 8. For the form of the order of commitment see Form 55. For the costs incurred in respect of the judgment summons, hearing, and order for commitment see Schedule A of fees to County Court Rules 1886.

Sir *H. James* Q.C. and *Robert Wallace* (*W. Willis* Q.C. with them) for the respondent:—

The real nature of the order of the 4th of March is disclosed by the note made by the registrar at the time, which entirely corresponds with the letter written by him to the defendant's solicitor. From this evidence (the most satisfactory in the case) it appears that the order for commitment was an anticipatory one: in lieu of the original order a substituted order was made for payment by instalments of £4 a month, and the default for which the defendant was to be committed was not the non-payment of the £20, but was in respect of the anticipated default in payment of the future instalments of £4. This being so the order was clearly bad, no inquiry being made (or being possible) as to the debtor's means of paying such instalments. That such an order is invalid under the Debtors Act 1869 sect. 5 is admitted by the appellant's argument.

Sir *R. Webster* A.G. replied.

LORD HALSBURY L.C.:—

My Lords, in this case I desire to say at once that if I understood the facts to be as assumed by the Lord Chief Justice and

(1) 22 L. T. (N.S.) 666. (2) 13 Ch. D. 338, 341.

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by the Court of Appeal I should entirely agree with the law which they have laid down in their judgments.

The two different propositions which have been suggested as guiding the interpretation of the statute are as distinct as anything can be. The Debtors Act, in that respect giving the jurisdiction to the judges both of the High Court and of the county court, although exercised under different conditions, has prescribed that there shall be in substance an abolition of imprisonment for debt, but has also provided that if a debtor having had the means or having the means at the time when the matter comes for adjudication before either the judge of the High Court or the county court judge, wilfully refuses to pay or has improperly spent the money which he had after the date of the judgment, and has not applied it as he should have done in honesty for the purpose of satisfying the creditor's claim, there shall then be a jurisdiction, exercised by whichever judge exercises the jurisdiction, of sending him to prison, and that that sending of him to prison shall be a punishment to him for the offence which upon that hypothesis he has already committed, inasmuch as the Act specially provides that that imprisonment shall not be in satisfaction of the debt—it is an imprisonment for the offence which he has already committed.

In this particular case there are two views suggested as being, the one or the other, the true view of the facts. A certain debt was due by this debtor, and on the 4th of March, the debtor having been at a previous Court ordered to pay £20, the matter is brought before the judge. It is suggested on the one side that what happened was that the learned judge made an inquiry into the means of the debtor and ascertained on that 4th of March that he either had had or had at that date (it is immaterial to inquire which) means whereby that debt might have been discharged, and that he had refused or neglected to pay it, and that thereupon the learned judge directed an order for his commitment for ten days for the offence which at that date, namely, the 4th of March, was already consummate, but that he gave a direction to the registrar of the Court, in consequence of something which passed between the plaintiff and the defendant in the cause, that although that warrant of commitment might then and there have issued because the offence had already been

committed, yet it might be suspended and not put into execution if the debtor paid £4 a month in discharge of the debt which he had so owed and had so wilfully refused or neglected to pay.

If that is the true view of the facts it does not appear to be doubted that that was within the legal competency of the judge. What happened afterwards, whether the man had means or had not, whether he did comply with the conditions into which he had entered or not, could in logic or good sense have no relation to the offence which on the 4th of March was already consummate. But the extreme rigour of the law might be relaxed in his case if instead of continuing his refusal or neglect to pay he complied with what the plaintiff in the cause was satisfied with, namely, the gradual wiping off of the debt by the payment of £4 per month. And I do not think that any one observation of the learned judges in the Courts below, with the single exception perhaps of Lopes L.J., seems to throw any doubt upon such a course being legal. Lopes L.J., however, rather indicates that it might be a sort of circuitous evasion of the Act of Parliament.

On the other hand it is suggested that the facts of the case were these—that the £20 being due the parties appeared before the learned judge, and that the learned judge made no order for commitment for the non-payment of the £20, that what he did was to make a substituted order with regard to the £20 with which the previous order had dealt and to reduce the amount payable to instalments of £4 a month.

The question of fact for your Lordships to determine upon those materials resolves itself into this question: What was it that the learned judge did at that date, and was there any substituted order made? There is not a fragment of evidence of any such order having been made at all. On the contrary, in the form which is relied upon in argument by the respondent, "I hereby certify that the above is a true copy of an entry in the summonses for commitment, interpleader, and minute of orders thereon," I find that every one of the entries included in that certificate is absolutely inconsistent with the existence of any such order as it is suggested to your Lordships was made. I find that the amount for which the summons was issued was £20. I find that the order is not an order for £4 with the additional

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direction that if not paid the person is to be committed; but I find "Commitment 10 days; suspended 14 days." What does that mean? If the order which is now suggested was made, namely that the instalment was altered from £20 to £4 and that that was to be paid in future, how could there be any commitment for ten days? There was no default made, and the commitment for ten days would have been totally inappropriate, for the judge could not possibly anticipate that the order would not be obeyed.

When one looks at the order for commitment which was ultimately issued it appears to be very clear in its terms. Those terms are, "Whereas the defendant hath made default in payment of" what? "Of £20 16*s*.," the odd 16*s*. being the cost of the hearing, I suppose: "And whereas a summons was, at the instance of the plaintiff, duly issued out of this Court, by which the defendant was required to appear personally at this Court on the 4th day of March, 1886, to be examined on oath touching the means he had then or had had since the date of the judgment, to satisfy the sum then due and payable in pursuance of the judgment, and to shew cause why he should not be committed to prison for such default." "And whereas at the hearing of the said summons it has now been proved to the satisfaction of the Court that the defendant now has [*or* has had] since the date of the judgment the means to pay the sum then due and payable in pursuance of the judgment, and has refused [*or* neglected] to pay the same, and the defendant has shewn no cause why he should not be committed to prison: Now, therefore, it is ordered that for such default as aforesaid"—for the non-payment of the £20 which he had the means of paying on the 4th of March—"the defendant shall be committed to prison for ten days."

Every document in the cause appears to me to bear the same meaning. Even the document upon which so much reliance has been placed—the note made by the registrar upon a scrap of paper—seems to be in accordance with the note of the learned judge. What I should understand that to mean was that the order had then been made by the judge for commitment for ten days, but that it was to be suspended for fourteen days, and that

the condition upon which the warrant was to lie in the office and not to be given out to the high bailiff for execution, was the payment of £4 monthly.

If that is the true view of the matter, what is the error, what is the mischief, what is the objection on the part of the defendant of which he has a right to complain? He is not being adjudicated, as Sir Henry James put it, in default for his not having paid the £4 at the end of the fourteen days, but what he is adjudicated as guilty of contempt for, and what he is sent to prison for, is what the judge has found as a fact upon the judicial evidence before him, namely, that on the 4th of March he had the £20 and did not pay it. I cannot help thinking that some confusion has been created by the ambiguous use of the word "order" without describing what order, and of the word "direction" without describing what direction. This was an order of commitment for ten days for the non-payment of the £20 on the 4th of March, and not for the non-payment of the £4 at any subsequent date.

Under these circumstances it seems to me that the learned judge had full jurisdiction to make the order which, in fact, I find he did make, and if so, of course, this writ of prohibition cannot be sustained.

My Lords, I desire to say one word as to the letter of the solicitor on the one side and the reply of the person professing to act under the orders of the Court on the other. It seems to me to have been an irregular proceeding from beginning to end. The solicitor had no right to write such a letter—the registrar had no right to make any such reply. The registrar was thereby taking upon himself to give an exposition in contradiction of what the judge's order really was; and I cannot help thinking that that letter bears upon the face of it a sort of invitation to the registrar to fall into the trap which, as it appears to me, he has fallen into. I only desire to say, upon that matter, that I should regard it as certainly a novelty in our jurisprudence if the regular order of a learned judge could be affected, or qualified, or altered in the slightest degree by what some subordinate officer of the Court thought proper to say in writing about it, even though in so doing he committed this additional irregula-

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rity—that to that private correspondence he affixed the seal of the Court.

For these reasons I move your Lordships that the judgment of the Court below be reversed, and that this appeal be allowed with costs.

LORD WATSON:—

My Lords, I shall content myself with saying that I entirely concur in the judgment which has been proposed by the Lord Chancellor, and also in the reasons which have been assigned for it by his Lordship.

LORD BRAMWELL:—

Mr. Lords, I am of the same opinion and for the same reasons. I think a county court judge would do wrong if merely because both parties were willing to give time, as was done here, he should adjudicate that the man had had means and had made default. At the same time if the whole conduct of the parties before him was such as to recognise that the man had had means, the county court judge might well adjudicate without any specific proof of it. I think it is important to bear in mind that an adjudication of committal ought only to take place where there has been a wilful default in payment; because in truth this power of committal is not an imprisonment for debt, it is an imprisonment for past dishonesty, together with the prospect of the plaintiff getting his money.

There is one remark which I should like to make about imprisonment under the Debtors Act. It has nothing to do with the particular case, but it might be useful to mention it. A learned county court judge once told me that at first he used to make orders of committal for a short time and he found that the people went to prison. He then lengthened the period and he found that fewer people went to prison; and he found that the longer the period for which he committed people to prison for not paying, the shorter was the total amount of imprisonment suffered by debtors, because when they were committed for the whole six weeks they moved heaven and earth among their

friends to get the funds and pay; whereas if the term was a short one they underwent the punishment.

To come back to the matter in hand, I agree that for the reasons which have been given we ought to decide that there was here a finding by the county court judge that the man had had the means and had made default in paying the amount, and an adjudication that for that default he should go to prison for ten days, but there was a direction at the same time that the execution of that order should be respited or delayed, and that it should not be executed at all if payment were made according to the instalments which were mentioned.

LORD HERSCHELL:—

My Lords, I quite agree. I am not surprised altogether at the view of the facts taken by the learned judges in the Court below, considering the way in which the case was presented to them and the admissions or statements which were made by the learned counsel who appeared on behalf of the county court judge. I think that we have probably an advantage which they had not with regard to arriving at a correct view of the facts of the case.

I should be extremely sorry to be supposed to throw any doubt upon the view which was expressed by the learned Master of the Rolls, in conformity with that which he said had been entertained by Mr. Justice Willes, and had been acted upon by the judges; but I think that in the present case there was an inquiry as to the means of the debtor; there was the conclusion that he was in default; there was an order for his commitment in respect of that default; and all that was done further was that, in mercy to the person declared liable to suffer imprisonment, he was allowed an opportunity of escaping from that liability provided he made certain payments. Now I do not think it is material how the amount of those payments was arrived at, whether it was according to what the judge thought he would be able to pay, which was perfectly consistent with his having been in default in respect of past non-payment, or whether it was according to what the plaintiff was willing to take. I do not think that we need enter into those motives at all, because I do not think that it was in respect of the non-payment of those sums that any proceedings were taken

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to cause the debtor to suffer imprisonment which led to this application for a prohibition. But I desire to say this, with regard especially to what was urged by Mr. Wallace, that I think a judge would very much neglect his duty if in order to save himself the trouble of inquiring whether there was default, and whether the man had possessed the means of making payment of the instalments down to that time ordered, he were to issue a warrant of commitment with a stipulation for suspension if some smaller sums were paid, without having really arrived at the conclusion that there had been default. I think that that would be a most irregular and improper proceeding and one which might very well be called in question. I think that it would be an abuse. But if there has been really in good faith a determination and adjudication of a past default, then I cannot see that the case is open to the objections which have been raised.

LORD MACNAGHTEN :—

My Lords, I concur.

Order of the Court of Appeal and order of the Queen's Bench Division reversed; the respondent to pay to the appellant the costs of the appeal to this House; cause remitted to the Queen's Bench Division.

Lords' Journals 24th November 1887.

Solicitor for appellant: *Solicitor, Treasury.*
Solicitor for respondent: *E. A. Fuller.*

[HOUSE OF LORDS.]

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THE GREAT WESTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

ROBERT STAUNTON BUNCH AND WIFE. RESPONDENTS.

Railway Company—Common Carriers—Passengers' Hand-Luggage—Delivery to Porter—Negligence.

The female respondent arrived at the Paddington Station of the appellants' railway at 4.20 P.M. on Christmas Eve with a bag and two other articles of luggage, in order to travel by the 5 P.M. train. A porter labelled the two articles and took all the luggage to the platform, the train not then being at the platform. The female respondent told the porter she wished the bag to be put into a carriage with her and asked if it would be safe to leave it with him. He replied that it would be quite safe and that he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. Ten minutes after she had left the luggage she and her husband returned together to the platform and found that the two labelled articles had been put into the van of the train but that the porter and the bag had disappeared. In an action in the county court against the railway company for the loss of the bag the judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the porter was guilty of negligence in not being in readiness to put the bag into the carriage when the female respondent returned, and held the company liable:—

Held, by Lord Halsbury L.C. and Lords Watson, Herschell, and Macnaghten (Lord Bramwell dissenting), that there was evidence upon which the county court judge might reasonably find, first, that the bag was in the custody of the railway company for the purposes of present and not of future transit from the time when it was delivered to their porter until its disappearance, and secondly that its loss was due to their negligence:—

Semble, by Lord Halsbury L.C. and Lords Watson, Herschell and Macnaghten (Lord Bramwell dissenting), that a railway company accepting passengers' luggage to be carried in a carriage with the passenger, enter into a contract as common carriers, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory.

The decision of the Court of Appeal (17 Q. B. D. 215) affirmed.

The reasoning in *Bergheim* v. *Great Eastern Railway Company* (3 C. P. D. 221) disapproved.

APPEAL from a decision of the Court of Appeal (17 Q. B. D. 215).

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In an action brought by the respondents against the appellants in the Marylebone County Court to recover damages for the loss of a bag and its contents, the following evidence was given:—

On the 24th of December 1884 the respondent, Mrs. Bunch, arrived at the Great Western Railway Station, Paddington, at 4.20 P.M. with a portmanteau and hamper, and also a Gladstone bag belonging to her husband, the other respondent, for the purpose of travelling to Bath by the 5 P.M. train. A porter came forward and put all the luggage on a trolley, labelled the portmanteau and hamper, and wheeled the trolley on to the platform. Mrs. Bunch told the porter that she wished the bag to be put into a carriage with her, and asked him if it would be safe to leave it with him. The porter replied that it would be quite safe, and that he would take care of the luggage and put it into the train. Mrs. Bunch then left the porter standing by the luggage on the platform, and went to the front of the station to meet her husband and get her ticket, and found that he had just arrived from the Moorgate Street Station, where he had taken a through ticket for himself to Bath, and that on his arrival at the Paddington Station he had also taken there a ticket for her to Bath. Ten minutes after Mrs. Bunch had left her luggage with the porter on the trolley, she and her husband returned together to the place where she had left the trolley, and found that it had been taken away, and that the portmanteau and hamper had been put into the van, but that neither the bag nor the porter were forthcoming. There was a great crowd, it being Christmas Eve.

Similar tickets to those taken by the plaintiffs were put in, and purported to be "issued subject to the conditions stated on the company's time bills;" and a copy of the "time bills" was also put in, containing certain "general notices and regulations," which it was contended were the "conditions" referred to by the tickets; and likewise a copy of a printed notice, in large characters, which was affixed in the labelling vestibule. Amongst the general notices and regulations contained in the time bills were the following:—

"LUGGAGE—The company will not in any case be liable for luggage taken with the passengers into the carriages, but only when it is properly labelled and placed in a luggage van. The

company will not be responsible for luggage not labelled, or improperly labelled."

The material parts of the notice affixed in the labelling vestibule were as follows:—

"Passengers are required to see their luggage duly labelled, as until so labelled it will not be put into the trains, nor will the company assume or incur any responsibility whatever in respect thereof."

"The company's servants have strict orders not to take charge of any luggage or parcels, and if passengers are desirous of leaving them under the charge of the company they must themselves take or see them taken to and deposited in the cloak-room."

The county court judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the porter was guilty of great negligence in not being in readiness to put the bag into the carriage with Mrs. Bunch on her return, as promised; and he gave judgment for the plaintiff, Mr. Bunch, for £18, and non-suited the female plaintiff.

The defendants having obtained a rule in the Queen's Bench Division calling on the plaintiffs to shew cause why judgment should not be entered for the defendants or a new trial had, Day and A. L. Smith JJ. differed, Day J. giving judgment for the defendants, and A. L. Smith J. (who was of opinion that the defendants were liable) withdrawing his judgment. The rule was accordingly made absolute to enter judgment for the defendants.

The Court of Appeal (Lord Esher M.R. and Lindley L.J., Lopes L.J. dissenting) reversed the decision of the Queen's Bench Division and restored the judgment in favour of the plaintiff, Mr. Bunch (1). Against this decision the defendants now appealed.

During the argument in this House it was agreed between the learned counsel that it was to be taken as a fact that the train was not at the platform when Mrs. Bunch arrived there with the porter and the luggage.

(1) 17 Q. B. D. 215.

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1887. Nov. 24, 25, 29. Sir *H. James* Q.C. and *R. S. Wright* for the appellants :—

It is admitted that a railway company are common carriers of luggage labelled and carried in the van. But of luggage which the passenger carries with him in the carriage, they are not common carriers, for the passenger takes it out of their control. It was so decided in *Bergheim* v. *Great Eastern Railway Company* (1), and the principle of that decision covers this case. If the company are not insurers of the luggage while it is in the passenger's carriage, neither can they be while it is on its way from the cab to the carriage.

Upon the facts of the present case the appellants submit three propositions: First, the proper inference from the facts is that the bag was handed to the porter, not for transit, but to take charge of it for the passenger, and there is no evidence that the company authorize their porters to take charge of hand-luggage for passengers. Such a supposition is inconsistent with the complete control which a passenger retains over such luggage. The company, no doubt, provide porters and permit them to carry hand-luggage from the cab to the train, but that is for the passengers' convenience, and the company are not bailees of such luggage. It is agreed between the appellants' and respondents' counsel that when the bag was given to the porter the train was not drawn up at the platform. The porter therefore could not place it in the train. What ought he to have done with it? If each porter is to watch over each bag handed to him, the company must keep thousands of porters for no extra remuneration. On these terms the company could not carry on its business. The county court judge thought that the facts here were on all fours with those in *Lovell* v. *London, Chatham and Dover Railway Company* (2). There the passenger went away only to get her ticket. Here she went to meet her husband, for her own convenience, and for an unreasonable time having regard to the duties of porters. It is manifest from her asking the porter as to the safety of the bag that she knew it was left at her own risk.

But, secondly, even if this bag was received by the porter for transit, the company merely permit the porters to assist the

(1) 3 C. P. D. 221. (2) 45 L. J. (Q. B. D.) 476.

passengers, and are not liable as insurers, nor except in case of negligence. And here there was no sufficient evidence of such negligence as would amount to a breach of contract. The plaintiff must shew negligence dans locum injuriæ. Mere non-production of the bag is no evidence of negligence, or of liability when the company are not insurers. The defendants are not bound to prove a negative; the onus is on the plaintiff to give positive evidence of negligence: that the loss was caused by the want of some precaution which the defendants ought to have taken: *Daniel* v. *Metropolitan Railway Company* (1).

Lastly, the special conditions which were incorporated in the contract by the notice on the ticket exonerate the defendants from liability, and that whether the passenger saw the notice or not: *Watkins* v. *Rymill* (2), explaining *Henderson* v. *Stevenson* (3). [They also cited *Stewart* v. *London and North Western Railway Company* (4), per Pollock C.B., and discussed the cases cited before the Court of Appeal and in the judgments of that Court.]

C. C. Scott for the respondents:—

The company are and hold themselves out as common carriers of passengers' luggage except so far as the passenger resumes control over it in the carriage in which he takes it with him. The point in the present case is decided by *Richards* v. *London, Brighton and South Coast Railway Company* (5). There the inducement that the company were common carriers of the dressing-case was traversed, and the Court held that they were common carriers of it. Here there was one bailment to the company of all three articles of luggage, and there was no determination of the bailment. The porter in receiving these things was certainly acting as the company's servant. He was not the passenger's servant. But if the company were not insurers they are liable for negligence, and there was negligence in the porter in not keeping a watch on the bag; and the county court judge so found. It is impossible to say that there is not evidence on which a jury might find for the plaintiffs, and if so that is enough for this

(1) Law Rep. 3 C. P. 216, 591; 5 H. L. 45.
(2) 10 Q. B. D. 178.
(3) Law Rep. 2 H. L., Sc. 470.
(4) 3 H. & C. 135, 139.
(5) 7 C. B. 839, 858; 18 L. J. (C. P.) 251.

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appeal, for the inferences of fact drawn by the county court judge are conclusive upon these proceedings. As for the special conditions, they do not avail the company, as there was no signed contract: *Peek* v. *North Staffordshire Railway Company* (1). Moreover the notices and conditions apply only to luggage brought for deposit. And they cannot be looked at upon the question of the porter's authority. [He also discussed *Great Western Railway Company* v. *Goodman* (2), *Macrow* v. *Great Western Railway Company* (3), and the cases cited in the Court of Appeal.]

R. S. Wright replied.

The House took time for consideration.

1888. Feb. 24. LORD HALSBURY L.C.:—

My Lords, the form in which this question arises for your Lordships' decision is one which precludes any consideration of the propriety or impropriety of the decision of the learned county court judge as to any question of fact as to which there was legal evidence before him. I must observe that both the learned judges in the Divisional Court appear to me to have treated questions so conclusively found, as nevertheless open to review. It is, perhaps, not surprising that when questions arise upon what either are, or are assumed to be, matters of daily experience, even a judge is tempted to import his own knowledge, and so give a colour to facts which he ought to treat as finally and conclusively decided by the tribunal to whom they have been remitted.

Now, in this case the facts have not been specifically found; but the learned judge has found a verdict for the plaintiff, and has stated that finding together with the evidence. If therefore it is possible to find a verdict for the plaintiff upon that evidence, the plaintiff is entitled to maintain his verdict. It seems to me that the two contentions which have been in debate before your Lordships would resolve themselves into a question of fact, upon which there might be a difference of opinion if the facts

(1) 10 H. L. C. 473. (2) 12 C. B. 313; 21 L. J. (C. P.) 197.
(3) Law Rep. 6 Q. B. 612.

were here open to review. Your Lordships, in the first place, have to ascertain, not from any written instrument, nor from any express words of contract, what were the contract relations between the plaintiffs and the defendants. I confess I should have been better satisfied if some evidence directed to what was the practice of the particular railway company had been before us; but in this, as in other parts of the case, I must content myself with saying, that if there was enough to enable the learned judge to infer what was the practice, and from thence to infer what was the contract, I am not at liberty to review his decision.

There are, of course, some facts which both sides have assumed to be proved, and with respect to which it would be mere pedantry to suggest that they were not formally proved. That the defendants, for instance, were a railway company carrying on the business of common carriers for hire; that the premises upon which the plaintiffs' luggage was deposited were premises belonging to and in the exclusive control of the defendant company; that the arrangement of the trains, the bringing of them to the platform, the arrangements by which the luggage, whether hand-luggage or van-luggage, was to be distributed, were all under the superintendence and direction of the defendant company, are matters as to which no formal evidence is to be found in the report of the county court judge, but are also matters as to which no one has or can suggest any real doubt. I do not think that any of your Lordships entertain any doubt that if the plaintiffs' luggage were entrusted to the porter for deposit and custody as distinguished from the physical handing over for the purpose of transit, the defendants would not be liable. The question really in debate is somewhat obscured by the existence of the cloak-room system; and that system, I think, is expressly guarded by the company not permitting any of their servants undertaking the guardianship of any property whatsoever, except under the circumstances and upon the conditions which the company prescribe; but I think the same question would arise and should be decided upon precisely the same principles if the company had no cloak-room system, and gave no authority to their servants to receive luggage at all, except as incidentally to their contract of carriage.

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It is worthy of remark that Day J. and Lopes L.J., upon an assumed state of facts at which I think the county court judge was at liberty to arrive, lay down the law very much as I should agree it ought to be laid down. Day J. says: "If a passenger requires him (the porter) to delay a reasonable time, while, for instance, the passenger takes a ticket, he (the porter) is responsible during all reasonable time that should elapse between the arrival at the station and the arrival on the platform of the passenger, taking the ticket being allowed for and the little journey to the platform; during all that time he is the agent of the company as bailees of the luggage which is entrusted to him; he is acting in the ordinary discharge of his duty;" and Lopes L.J. says: "I do not think it is part of the employment of an ordinary porter to take charge of luggage beyond the time usually or reasonably, I should say reasonably, necessary for this transit," the words of the Lord Justice "this transit" referring to the transit of the goods from the cab or outside of the station.

The admissions of counsel have rendered it unnecessary to rely upon mere inference in this case, as to the question of whether the train had been drawn up to the platform or not; and we must now accept it as a fact that neither the van nor the carriages for the passengers were in a position to enable the hand-luggage or the van-luggage to be placed where they were intended to be deposited for the purposes of the journey.

My Lords, if I were myself to be drawing inferences as to the reasonableness in point of time of the period of the plaintiff's arrival before the departure of the train by which she intended to travel, I am not certain how I should decide that question; on the one hand, forty minutes seem a long time before the departure of the train, and to call upon the servants of the company to take charge of luggage for the purpose of the journey; on the other hand, the fact that it was Christmas Eve; that the railway company were, within a very short time of the arrival of the plaintiff, issuing tickets for that journey; and that the porters were receiving without objection or demur van-luggage, with respect to which it is not denied that they were, in so doing, acting in pursuance of the authority conferred on them by their employers, are all circumstances from which, I think, it might be inferred

that the time was not too long; but, in truth, my Lords, I am not entitled to speculate upon the matter; this is essentially a question of fact, and the learned judge has, in this instance, specifically found that the time of the entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. It seems difficult to say that, with the evidence before him to which I have adverted, it was not open to him to arrive at that conclusion.

Now, my Lords, while I entirely agree that the duty of the porter, as disclosed by the evidence, is either to take the luggage to the cloak-room if entrusted to him for the purposes of deposit, or to the train if for the purposes of the journey, I am at a loss to understand how the circumstance that the train is not at the platform can affect the liability of the company. Assume that the company are receiving luggage for the purposes of the journey, and that they do so receive luggage for the purposes of the journey, the presence or absence of the train at the platform is a matter within the control of the company, and not of the passenger, and I cannot understand what evidence there is in this case from which it could be reasonably inferred that the porter would be acting within the scope of his authority in receiving the plaintiff's luggage if the train were at the platform, and beyond it if the train had not come up. Doubtless a company might make a regulation if they thought fit: "We will not receive luggage for a train forty minutes before it starts;" they might say, "We will not receive luggage to be put on a train which has not yet arrived at the platform." I should very much doubt whether any railway company has any uniform practice as to the period of time which they allow to elapse between the arrival of the train at the platform and its departure. It is enough, however, to say, that in this case no evidence of any such practice was given.

If a possible inference to be derived from the facts as proved, is, that what the porter did in this case was the ordinary practice of the company, then I should say it would follow that the mode in which the company carried on its business was, to accept the passengers' luggage at the entrance to the station, and to take it to its intended destination, whether van or passenger carriage, at

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the option of the passenger, and that during the period of what Lopes L.J. describes as "this short transit" it would be in the custody of the company for the purposes of, and as part of, the journey. If the train were at the platform, it would, I suppose, in ordinary course, be distributed, some to the van and some to the passenger carriage, as directed; but, once the porter has received and accepted it as luggage to be received and forwarded by the train about to start, it seems to me impossible to contend, and I do not understand Lopes L.J. or Day J. to contend, that it is not in the custody of the company for the purposes of the journey. If the porter refused to take charge of the luggage, the company might be liable for refusing to carry according to their professed mode of carriage, but might not be liable for loss of goods which they refused to carry; but whether the porter would be doing his duty in refusing to take charge of the luggage during the short transit, or acting in pursuance of his masters' orders, is the very question in debate. If one assumes that it was contrary to his duty, of course the company would not be liable; if it was his duty, the company would be liable.

But why am I to assume, upon the facts here put in proof, that the porter was acting contrary to his duty, and, in hopes of personal gain to himself, undertaking a course of business not imposed upon him by the orders of the railway company? I confess, for myself, I should draw the same inference that was drawn by the county court judge; but what the defendants, in order to succeed, must establish, is, that the county court judge could not by law have drawn such an inference. It is suggested that Mrs. Bunch's phrase, in asking the porter whether her bag would be safe, exhibited a consciousness that she was asking a favour, and not insisting on her rights as a passenger. I admit that the word "it," grammatically, as the evidence is reported to us, appears to refer to the bag, but I think what Mrs. Bunch meant was the luggage, both van- and hand-luggage, upon the trolley. But, whatever Mrs. Bunch meant, I think she might have asked with equal force whether the train would arrive safely at its destination; and I do not think either her question or the porter's reply would have affected the contract relations of the parties. The truth is, that in the conduct of business more contracts are

made by the understood course of business than are ever reduced into writing, or even into spoken words at all; and I think that, when people hold themselves out as carriers, and receive luggage at a place regularly appointed to receive luggage for the purposes of a journey, they must be understood to receive it as carriers unless they give notice to the persons from whom they receive it that they receive it in some other capacity. It may be said that I ought not to disregard the existence of the cloak-room system, and that the receipt by the company's servants is susceptible of two interpretations. I admit that this is so; but in this case Mrs. Bunch at once informed the porter that the portmanteau and the hamper, as well as the Gladstone bag, were to be put into the train; and I agree with Lindley L.J. that the company's notices and directions to their servants are intended to apply, and upon their true construction do apply, to luggage received for purposes of deposit, and not for purposes of transit, and it is upon this part of the case that I think the finding of the learned judge is conclusive against the defendants when he finds that the time of entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. Once that proposition is accepted as conclusively found, it seems to me that the law that would be laid down by the minority of the Court of Appeal would amount to this: that a passenger bringing his luggage for carriage, a reasonable and proper time before the departure of the train by which the luggage is to be carried, can enforce no liability upon the company in respect of his luggage except it is placed in the cloak-room as a preliminary to the transit, and a receipt given for the same. And even this inadequately represents the difficulty of the contention, since it is obvious, from the notices put in evidence, that the cloak-room tickets and receipts import that the passenger who has deposited his luggage in the cloak-room is expected to get it out again from that same cloak-room, and if he wishes to travel must again commit it to the custody of the company after he has so taken it out. It would seem, therefore to involve this proposition, that for parcels carried in the passenger carriages the railway company never can be liable at all.

I do not know that it is absolutely necessary in this case

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to determine what is the exact contract between the company and the passengers, since the learned judge has found negligence against the company, and I do not understand that there is any difference of opinion among us, that if there was any contract to take care of the bag there is sufficient evidence of negligence. But I must express my opinion that the views expressed by Lord Truro, Jervis C.J., Williams J., Crowder J., Willes J., Keating J., and Montague Smith J. do not appear to have had sufficient weight given to them—see *Richards* v. *London, Brighton and South Coast Railway Company* (1); *Talley* v. *Great Western Railway Company* (2); *Butcher* v. *London and South-Western Railway Company* (3)—by the judgment in the Court of Appeal in *Bergheim* v. *Great Eastern Railway Company* (4). All these learned judges appear to me to adopt the view that a railway company in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default.

In *Bergheim* v. *Great Eastern Railway Company* (4) the Court of Appeal, commenting upon the case of *Talley* v. *Great Western Railway Company* (2), do not, I think, quite accurately represent the judgment of the Court of Common Pleas. In *Talley* v. *Great Western Railway Company* (2) that judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care, the fact being that the loss was caused by his neglect to do so, and would not have happened without such negligence. The negligence in question was leaving his portmanteau in a carriage unprotected by his presence; it was found at the end of a journey cut open and its contents rifled in a carriage which he had originally travelled in as far as Swindon, but which he had negligently omitted to re-enter upon leaving the refreshment-room at that station. It is

(1) 7 C. B. 839.
(2) Law Rep. 6 C. P. 44.
(3) 16 C. B. 13.
(4) 3 C. P. D. 221.

obvious that if the Court were right that the general liability of the company was modified by the undertaking of the passenger to look after his own luggage while it was in the passenger carriage, he had omitted that duty. But suppose the loss had happened by reason of some circumstance which would have been no breach of that modifying stipulation, could it have been contended that the company were not responsible as common carriers because they were carrying for hire in one part of the train and not in another? If the view thus assumed is the correct view of the law, and I think it is, the moment the porters received Mrs. Bunch's luggage, whether van- or hand-luggage, they received, for carriage to Bath, all the luggage of the passenger; they received the van-luggage to be put into the van; they received the hand-luggage to be put into the passenger carriage; and I think the learned judge was entitled to infer that their practice, and therefore their contract, in receiving hand-luggage, was to put it into the passenger carriage, or if the railway company did not then bring up the train to the platform, to take care of it until the carriage was drawn up and in a position to receive the hand-luggage, which, in my view, the porter, as the agent of the railway company, had accepted and received for that purpose.

For these reasons, I am opinion that the judgment of the Court of Appeal was right, and I move your Lordships that that judgment be affirmed, and that this appeal be dismissed with costs.

LORD WATSON:—

My Lords, this appeal brings up for consideration the decision of a county court judge, which the higher Courts and this House have no jurisdiction to review, except in so far as it involves principles of law. It is impeached upon this ground, mainly, that there was no evidence before the learned judge from which it could be reasonably inferred that, at the time when it disappeared, the respondent's Gladstone bag had been delivered to, and was in the possession of, the appellant company for the purpose of carriage. The evidence it is said, points to, and only warrants, the conclusion that the bag was in the custody of a railway porter as bailee for the respondents.

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In *Butcher* v. *London and South Western Railway Company* (1), Jervis C.J. observed, in reference to luggage which had been conveyed in the same carriage with its owner, "that, though not in express terms engrafted into it, it is a part of the contract of a railway company with its passengers, that their luggage shall be delivered at the end of the journey, by the porters or servants of the company, into the carriages or other means of conveyance of the passengers from the station." What was thus said of the termination applies equally to the commencement of a railway journey. In the ordinary course of business a passenger's luggage is received at the entrance to the station by the servants of the company, and is by them conveyed either to the van or to the carriage in which he intends to travel. I do not mean to say that railway companies are under any statutory or other obligation to provide that accommodation; but they find it for their interest to do so; and, in taking charge of luggage for these purposes, their servants act within the scope of their implied authority. Their duty is, according to prevailing usage, limited to the transport of passengers' luggage from the vehicle which brings it to the station to a train which is about to start, and does not extend to their taking charge of luggage which cannot, in any reasonable sense, be considered as in actual course of transit. It may be that railway porters do sometimes undertake the charge of luggage which is merely intended for future transit; when they do so, they exceed the limits of their implied authority, and, in that case, their possession cannot be regarded as the possession of their employers.

If the respondents had gone to Paddington station at noon of the 24th of December 1884, and had then left their Gladstone bag with a porter in order that it might accompany them on their journey to Bath by the 5 P.M. train, I should have had no hesitation in holding that the appellant company had not become responsible for its safe custody during the interval. In that case, it would have been in accordance with well-known practice, and therefore an implied term of the subsequent contract between the parties, that the company were not to be liable, unless the luggage was duly deposited in the office provided for that purpose.

(1) 16 C. B. 22.

On the other hand, if the respondents had arrived at the station at 4.55 P.M., I entertain as little doubt that the delivery of their Gladstone bag to a porter, for the purpose of its being conveyed to the carriage in which they were about to travel, would have made the possession of their porter that of the appellant company.

Whether passengers' luggage, delivered to a railway porter, is in his possession for present, or merely with a view to future transit, is necessarily a question of degree, depending upon the circumstances of the case. Railway companies, as a matter of fact, frequently provide for the travelling public, not only booking offices, but refreshment rooms, and other conveniences; and passengers who merely avail themselves of such accommodation as incidental to their use of the railway, cannot be held to have temporarily ceased to prosecute their journey. It is impossible to fix any precise limit of time prior to the starting of a particular train, within which the company are to be liable for passengers' luggage delivered to their servants for conveyance by it, and beyond which they are not to be liable. In my opinion the company are responsible for luggage delivered to, and in the custody of, their servants, for the purpose of transit, whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail, and is not merely waiting in order to begin its prosecution at some future time.

In the present case, the evidence shews that the female respondent arrived at Paddington station forty minutes before the train by which she and her husband travelled was timed to start. She gave her luggage into the charge of one of the appellant company's porters, saw part of it labelled, and directed the porter to place the Gladstone bag, which was not labelled, in the same compartment with herself. The respondent then left the platform, and went to the booking office, for the purpose apparently, either of taking her ticket, or of seeing that her husband procured it for her. She there met her husband, who had taken a ticket, and on their return to the platform, about ten minutes after her arrival, they found that the labelled luggage had been placed in the van, and that the porter and the Gladstone bag had both disappeared.

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In these circumstances, I think the county court judge might reasonably come to the conclusion that the bag continued to be in the custody and possession of the appellants for the purposes of present and not of future transit from the time when it was delivered to their porter until its disappearance.

In the argument for the appellants considerable stress was laid upon the fact that at the time when Mrs. Bunch left her luggage upon the platform, the five o'clock train had not come alongside it. That circumstance does not seem to me to be very material, because a passenger can have no personal knowledge of it until he reaches the platform. What appears to me to be matter of more consequence in the present case is, that it was Christmas Eve; that there was a great crowd of passengers intending to travel by the train in question; and that the servants of the company, as might have been anticipated, were, at the time when Mrs. Bunch arrived at the station, inviting passengers to take tickets, and receiving their luggage for the purpose of its being put in the train. I attach no importance to the question put by Mrs. Bunch to the porter, or to his assurance, in reply, that her luggage would be quite safe, and that he would put it in the train. A conversation of that kind could not alter the contractual relations between her and the company.

On the assumption that the appellant company did become responsible for the safe keeping of the bag in question, it was argued on their behalf, that there was no evidence before the county court judge to justify the inference that its loss was due to their negligence. Upon that point I am of opinion that the evidence was sufficient to sustain the inference, but I am by no means satisfied that, in order to entitle them to judgment, the respondents were bound to prove that the appellants had been negligent. That depends upon the nature of a railway company's contract liability for hand-luggage, including in that term heavier articles, such as are commonly put in the van, when these are placed, or intended to be placed, with the assent of the company's servants in the carriage in which their owner intends to travel, as well as lighter articles which are generally, if not invariably, carried beside him.

It does not admit of question that passengers' luggage, duly

delivered to the company's servants for carriage in the railway van, remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers, in cases where the passenger has assumed, in whole or in part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent judges have differed as to the nature of the contract under which hand-luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner, that is to say, with ordinary care, others being of opinion that it is throughout a contract of common carriage, modified by the personal interference of the passenger. Whichever of these views be accepted, it is manifest that, in many instances, the resulting liability of the company will be precisely the same, but, according to the second of them, the full responsibility of the company may revive on occasions when, from causes incidental to his journey, the interference of the passenger ceases for a time, and his hand-luggage is committed to the exclusive charge of their servants.

At present the ruling authority upon this point is *Bergheim* v. *Great Eastern Railway Company* (1), where it appears to have been decided by the Court of Appeal, consisting of the noble and learned Lord opposite (Lord Bramwell), the present Master of the Rolls, and Cotton L.J. that the contract of the company, with respect to hand-luggage, is merely to carry with ordinary care. Cotton L.J. who delivered the judgment of the Court, said: "The company, therefore, must, according to ordinary principles be held liable in respect of those goods as bailees for hire and contractors to carry, and, therefore, liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself. This is our view on principle." The observations thus quoted were directed to the special case of a passenger's luggage which had been placed, at his request, and with the assent of the company, in the carriage in which he was to travel; and the learned

(1) 3 C. P. D. 221.

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judge possibly did not intend to extend the principle to luggage in the exclusive custody of the company's servants, for conveyance to or from the carriage. However that may be, I prefer the principle which appears to me to have been adopted in *Richards* v. *London, Brighton and South Coast Railway Company* (1) and *Butcher* v. *London and South Western Railway Company* (2). I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory.

I am, therefore, of opinion that the order of the Court of Appeal ought to be affirmed with costs.

LORD BRAMWELL :—

My Lords, it is the custom for English railway companies, at all events for the appellants, to have porters at the entrance of their railways to receive the luggage of passengers and convey it to the van or carriage in which it is to be carried. Whether this is a duty imposed on the companies, or a voluntary act on their part, is immaterial. It is a duty they undertake, at least this company does, and must, like other duties, be performed with skill, and without negligence.

What is this duty? I have said, to carry the passenger's luggage to the van or carriage in which it is to be carried. We all know that large packages are taken to the luggage van—smaller packages (often much too large for the comfort of other travellers), are, if requested by the passenger, taken to the carriage in which the passenger is to be carried, either that he may make use of it, or take personal care of it, or, more frequently, that he may hasten away with it without waiting for it to be given out of the luggage van. There is no further duty, or professed duty, that I know of.

If the passenger arrives before the train is at the platform, whether of a terminal station or not, the porter may certainly refuse to do more than take the luggage on to the platform, and leave it there in charge of the passenger. Of course, if the

(1) 7 C. B. 839. (2) 16 C. B. 13.

passenger wants to get his ticket, and says so, the porter must take the luggage on to the platform and wait and see to it till the passenger has got his ticket and comes to see to it himself.

If there is any duty beyond this, it is more than I know of or ever heard of; I mean any ordinary duty. There can be no duty on the company, or the porter, when the train is not at the platform, to take care of the luggage till it comes. If there is an obligation to do this for five minutes, there is an obligation to do it for as many hours. Every one knows it is not so; every one knows that a cloak-room is provided for the custody of luggage that the passenger wants to have taken care of till it can be put in the carriage in which it is to be carried. If this is true of luggage to be carried in the luggage carriage, and that is not there, it is equally true of luggage to be carried in the passenger carriage when the passenger is not there. If the luggage carriage is not there, the porter is not bound to take charge of the luggage till it comes. Of course, if he says nothing but takes it, and it is labelled for its destination and left in his charge, the passenger may well suppose, and has a right to suppose, that the company has taken charge of it for the journey. The passenger cannot tell whether the luggage carriage is there, or if not, whether the company is not content to take it to a place where it will be in readiness for the train when it comes, and be taken care of meanwhile.

So with respect to an article to be put in the passenger carriage, if the passenger should suppose a train he meant to go by was at the platform, and walked to it, and the porter said nothing, I should say that the passenger would have a right to suppose that the company had taken charge of the parcel, and was taking it to his intended carriage. But, if the porter said of luggage intended for the luggage carriage, "That carriage is not here, you must look after your luggage yourself," and the passenger does not look after it, there would be no pretence for saying the company was liable. The same thing is true of luggage to be put in the passenger carriage. It must be remembered that luggage to go in the passenger carriage is to go in the same carriage as its owner, the passenger. Suppose a train at the platform, the passenger says, "I want this in the carriage

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with me," the porter proceeds with the parcel to the train, the passenger goes somewhere else, not for a minute or so, but for some sensible time, five or ten minutes, perhaps half-an-hour. Would he have a right to complain if his parcel was placed near the train the passenger said he was going by, or taken to the lost luggage room? I say No. If he would, on what ground? He must know that by not following and taking his seat he was attempting to impose a burthen on the company's servant which he had no right to impose. Mrs. Bunch knew that. She did not say, "You must take care of this," or "I want to go and meet my husband," but asks whether the bag will be safe. It will be said that it is not to be expected that she would speak with the precision of a lawyer, or know the law. I agree, but I say that treating this practically, she knew—everybody knows—that she was asking for a favour—for something to which she had no right. Does any one believe that if the porter had said, "I can take your luggage to the luggage carriage and it will be taken care of, but you must take care of what is to go with you till you have taken your place,"—I say if he had said this, as he ought to have done, would any one believe she would have had any right to complain or have been surprised? Always let it be remembered that she knew it was necessary to get some promise or engagement from the porter other and more than the ordinary engagement of a porter when he takes luggage.

Now a word as to what he said. Of course, it was not a promise or contract by him for himself or the appellants. Certainly there was no consideration for it. All it amounted to was a statement of intention—a holding out of an expectation. "Will it be safe?" "Oh, yes; I will look after it." All that this means is, It will be safe, for I shall look after it. I say, then, that what the porter said did not impose a duty on the appellants which did not otherwise exist, that no duty existed in the appellants other than to carry the bag to the carriage in which she took her place if she took it forthwith; that if she did not take her place so that the porter could not give the parcel into her charge there, she left it in the care of the porter at her own risk. I say she knew this, as is shewn by her question to the porter and by her acceptance of his statement.

A word on the judgment below. Lord Esher says: "Now comes the case of luggage which is not to go into the van. The porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or to the carriage. During the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company." Be it so, but that is just what this bag was not. There was a time during which it was not in process of conveyance, a time during which it was stationary, during which the porter had said he would guard it. Lord Esher says: "The question is whether there was evidence upon which the county court judge might reasonably find for the plaintiffs." Evidence of what? Evidence of some fact on which he might reasonably so find? What fact? We know all the facts. Lindley L.J. says: "It seems to me a simple case of transit, not of entrusting to the porter in any sense than that in which everything put into his hands is entrusted to him. It is very true there was some short time during which it would not be necessary for him actually to keep walking or rolling his trolley. There was a short delay, but a delay so short as to make it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential to say more than this, that the porter was acting within the scope of his employment in taking the luggage in the way he did *from the cab to the train.*" Now, that is precisely what he did not do. He did not take it from the cab to the train. He put it down and said he would guard it, and did not. As to the time being short, it was to be as long as the lady was away, and might have been forty minutes, or more, if the plaintiff had not arrived. I agree with Lopes L.J. (1): "It was not part of the employment of a porter to take charge of luggage except during that transit, i.e., from the cab to the train." I mean by that, during the time which is fairly and reasonably necessary for that transit; and see p. 229.

I make no remark on other authorities beyond this, that they shew a generous struggle on the one hand to make powerful companies liable to individuals, and, on the other hand, an effort

(1) 17 Q. B. D. 229.

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for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly.

I have not used a technical expression, not a word about bailments, &c. I have used plain and practical language. The appellants were under no duty to take care of the bag while Mrs. Bunch went to look for her husband: the porter could, and ought to, have refused to do so. Had he done so Mrs. Bunch would have had no cause of complaint. By doing as he did he could impose no duty on the defendants which did not otherwise exist. Before the respondent can complain of negligence he must make out a duty of care—he has not done so. Not that I am sure it is a question of negligence. The sum in dispute is small, but I believe the question is of considerable importance. If the appellants are liable in this case, I do not know how they can avoid it in similar cases. It is certain that the porter exceeded his duty if he made the defendants liable, and I suppose other porters, from good nature or the hope of a tip, will do the same again, though expressly forbidden as this man was. The result of what took place is that the defendants are held liable for not taking care of the bag during the time it did not suit Mrs. Bunch to do so.

I cannot pretend to a doubt on the case. Nor can I understand the repeated expression that the county court judge might find as he did, an expression that imports he might have found otherwise. How can that be when the actual facts are not in dispute, nor the conclusions to be drawn from them? I hold that the judgment is wrong and should be reversed.

LORD HERSCHELL:—

My Lords, no appeal lies in this case from any conclusion of fact arrived at by the county court judge. It is only if he has erred in law that his judgment can be questioned. The single point, therefore, which has to be determined is, as it seems to me, whether there was any evidence to warrant the conclusion that the plaintiff's luggage was lost owing to a breach of obligation on the part of the defendants. It is not necessary for me to state the facts. They have been fully brought before the House by those of your Lordships who have preceded me. I will only

say that I do not think that the question put to the porter by Mrs. Bunch, or the answer given by him, really affects the case. If the company were under an obligation towards the plaintiff in respect of the bag, I cannot think that this question and answer diminished or destroyed it. If they were not under any such obligation, I do not think it was imposed upon them by the statement of the porter.

I concur entirely in the opinions which have been expressed by the noble and learned Lord upon the woolsack and the noble and learned Lord on my right (Lord Watson), and think it necessary to add but little.

Although there was a difference of opinion amongst the judges in the Court below, and your Lordships do not all take the same view, I think the difference is confined within somewhat narrow limits. I believe that all the judges who have dealt with the case and all your Lordships are agreed, that if luggage is brought to a railway station and handed to a porter so long before the time appointed for the starting of the train, that it cannot be reasonably said to be entrusted to him for the purpose of its transit with the passenger to his destination, but must be considered as so entrusted for the purpose of being taken care of until the time for the departure of the passenger arrives, the porter is not the servant or agent of the company to undertake the custody and care of the luggage, and the company would not be liable for its loss. Railway companies have provided cloak-rooms or left-luggage offices, which are the proper receptacles for luggage brought to the station under such circumstances.

On the other hand, I do not understand my noble and learned friend (Lord Bramwell), who differs from the majority of your Lordships, to doubt that the porter who receives a passenger's luggage at the entrance of the station for the purpose of conveying it to the train, does so as the servant of the company, and that they are liable as well for the luggage which the passenger intends to take with him in the carriage as that destined for the van in case it is lost during its transit to either carriage or van owing to the porter's negligence. And I understand him further to entertain the view that though the traveller does not proceed direct to the train with his luggage, but stops for the purpose of

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taking his ticket, the company are nevertheless liable during the time so occupied.

Now, I do not think it can be laid down that procuring a ticket is the only act incidental to the journey for which the passenger may pause on his way to the train without the company being free from liability in case the luggage is lost in the meantime; would not the case be the same if he waited to meet a person who had promised to take his ticket for him, provided always he has not come unreasonably early, and does not wait an unreasonable time? Does, then, the fact that the train by which the passenger is to depart is not at the platform when he arrives at the station make any difference? It may, no doubt, be an element in determining whether the passenger has arrived so early that the transit to his destination cannot properly be said to have commenced. But I do not think it is conclusive of the point, or that the obligation of the company is necessarily different from what it would be if the train were alongside the platform.

It is a matter of common knowledge that the practice of different railway companies, and indeed of the same company at different times, varies greatly as to the length of the period prior to the departure of the train during which it is drawn up at the platform. Sometimes after being at the platform the train is shunted out of the station, and only returns immediately before its departure. Under these circumstances it is impossible even for a passenger who arrives very shortly before the time fixed for the departure of the train to know, when he alights at the station and entrusts his luggage to a porter, whether the train is at the platform or not. The question whether the luggage can fairly be said to be in the custody of the company's servant for the purpose of transit, or of what I may term warehousing, will not, I think, be generally difficult of solution, though as it is not possible to lay down any strict line of demarcation, there will always be cases on the border where opinions may differ as to the proper conclusion to be drawn. In the present case Mrs. Bunch arrived forty minutes before the time of departure. She was about ten minutes waiting for her husband, who was to take her ticket. On the other hand, it was Christmas eve, when the trains are noto-

riously crowded, and prudence dictates an earlier arrival than usual. We have not to determine what would be our view of these facts. I concur with those of my noble and learned friends who think that the county court judge was warranted in point of law in arriving at the conclusion which he did with respect to them.

I have only to add that although it is not necessary in this case to determine what is the nature of the duty devolving upon a railway company in respect of luggage carried, or intended to be carried, in the same carriage with the passenger, I am disposed to agree with my noble and learned friends in preferring the view of this duty to be derived from the cases of *Richards* v. *London, Brighton, and South Coast Railway Company* (1), and *Butcher* v. *London and South-Western Railway Company* (2), to that enunciated in the judgment of the Court of Appeal in *Bergheim* v. *Great Eastern Railway Company* (3).

LORD MACNAGHTEN :—

My Lord, I concur in the motion which has been proposed.

Everybody who travels by railway knows that, as a general rule, persons arriving at a station with luggage are met at the entrance of the station by railway porters ready to receive their luggage, to take it to the platform, and to put it into the train. Everybody too knows that, while in ordinary course the heavier articles of luggage are labelled and placed in a van under the sole control and custody of the railway company, it is the common practice for passengers to take the lighter articles of luggage, or "hand-luggage," as it is called, in the carriage with them. This practice is recognised by railway companies, who provide suitable receptacles for hand-luggage in passenger carriages. And it is a practice as much for the convenience of railway companies as it is for the convenience of passengers.

It was contended by the appellants that in receiving a passenger's luggage, railway porters, though in the service of the company, and forbidden to accept any payment from the public, must be taken to be acting on behalf of the passenger, and as his

(1) 7 C. B. 839. (2) 16 C. B. 13.
(3) 3 C. P. D. 221.

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agents, and that this relation continues as regards van-luggage until it is labelled for the journey, and as regards hand-luggage until it is placed in the carriage in which the passenger intends to travel. Further, it was contended that the contract as regards van-luggage is altogether distinct and different from the contract as regards hand-luggage; that, in fact, there are two separate contracts, and that whatever may be the case as regards van-luggage, railway companies come under no liability of any sort as regards hand-luggage until it is placed in the passenger's carriage.

I cannot think this view correct. The services rendered by railway porters in receiving passengers' luggage, in taking it to the platform, and putting it into the train, are part of the ordinary facilities for passenger traffic which the public nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to afford. These services are covered by the fare which the passenger pays for his journey. They are offered in view of the contract which a person who presents himself with luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, runs from, or relates back to, the commencement of the journey; and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers—a contract to carry securely. The contract, no doubt, becomes modified as regards that part of the luggage which is put into the passenger's carriage. At the passenger's request, or at his instance, the company dispense with precautions which they think necessary for the safety of the goods they have undertaken to carry, and so the passenger relieves the company from some of the risks which otherwise would fall upon them. But, for all that, the contract is one contract, and in ordinary course, except so far as it may be modified by the

acts or conduct of the passenger, it remains in force during the continuance of the journey from its commencement to its end. If the reasoning in *Bergheim* v. *Great Eastern Railway Company* (1) seems to lead to a different conclusion, with all deference I am unable to concur in it. I prefer the view expressed by Willes J. in *Talley* v. *Great Western Railway Company* (2).

Your Lordships are familiar with the evidence in the case, and I do not propose to repeat it. It is enough to say that on the 24th of December 1884 at 4.20 P.M. Mrs. Bunch came to Paddington with a Gladstone bag and some other luggage, meaning to travel with her husband by the 5 P.M. train to Bath, that on her arrival at the station the luggage was received by a porter in the employment of the company, and taken by him to the platform for the purpose of the journey, and that the Gladstone bag was last seen on the platform with the same porter a few minutes afterwards. From that time all trace of the bag is lost. The porter and the bag both vanish from the scene. It was suggested by the learned counsel for the appellants, by way of explanation, that the porter was possibly one of a number of men picked up by the company for the day to meet the pressure of Christmas traffic. But I may observe, in passing, that so far as the public was concerned, there was apparently nothing to distinguish the casual helper, of whom little if anything was known, from the regular and trusted servants of the company.

On these bare facts standing alone it seems to me that there would be evidence upon which the county court judge might reasonably find for the plaintiff, even if the company were not under the liability of common carriers as regards the lost bag.

But then it was contended with much earnestness that it ought to have been inferred from the circumstances of the case and from Mrs. Bunch's conduct that at the time of the loss the bag was not in the custody of the company for the purpose of the journey. It was said that Mrs. Bunch came to the station too soon—that she came before the train was drawn up—that she broke the journey, if the journey is to be taken as having begun—and left the bag in the charge of a porter who was then not acting as the servant of the company within the scope of his authority as such, but

(1) 3 C. P. D. 221. (2) Law Rep. 6 C. P. 44.

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acting as her agent in his individual capacity, and that if this was not what she meant, it was an attempt on her part to saddle the company with a liability which they were not bound to undertake.

It seems to me that there is no substance in any of these objections. Mrs. Bunch, no doubt, came to the station somewhat early. But the one thing railway companies try to impress on the public is to come in good time. And considering the crowd likely to be attracted by cheap fares during the Christmas holidays, and the special bustle and throng on Christmas eve, it does not seem to me that Mrs. Bunch came so unreasonably early as to relieve the company who received the luggage from the ordinary obligations flowing from that receipt. It is impossible to define within the extreme limits on both sides the proper time for arrival. Everything must depend upon the circumstances of the particular case. But among those circumstances, the least important, as it seems to me, is the time when the train is drawn up at the departure platform. That is, as everybody knows, a very variable time. And it is a matter over which the passenger has no control, and of which he can have no notice before he comes to the station.

Then I think there is nothing in the conversation which took place between Mrs. Bunch and the porter. Mrs. Bunch's question was a very natural one. The answer she received was just what might have been expected. Nine women out of ten parting with a travelling bag on which they set any store would ask the same question. In ninety-nine times out of a hundred the same answer would be returned. I do not think that this conversation altered the relation between the parties in the least degree. It seems to me almost absurd to treat it as a solemn negotiation by which the lady abdicated such rights as she possessed against the Great Western Railway Company, and constituted this ephemeral and evanescent porter in his individual capacity the sole custodian of her Gladstone bag.

Nor can it, I think, be said that Mrs. Bunch broke the journey by leaving the platform to meet her husband and get her ticket. To take a ticket is a necessary incident of a railway journey. It is, at least, a very common incident in railway travelling for persons, who intend to travel in company, whether they be members of

the same family or not, to meet by appointment in the railway station from which they mean to start, and it is certainly not unusual in such a case for the purchase of tickets to be deferred until the meeting takes place.

It may be that a passenger who has delivered his luggage to a porter at the entrance of the station, though the delivery is in proper time for the intended journey, is not entitled as of right and under all circumstances to consider the company responsible for the safe keeping of his luggage before it is put into the train. A passenger knows that he is not the only person to be attended to, and it might not be unreasonable to hold that there is an implied agreement on his part that he will be ready to resume possession of his luggage if the exigencies of the traffic require that it should be handed back to him in the interval before the time comes to put it into the train. No such question, however, arises here. The lost bag was not left unguarded owing to the exigencies of traffic, or neglected by the porter who took it in consequence of the pressure of conflicting duties. But I desire to say that, for my part, I am not satisfied that a passenger's luggage which has been received by the company's servants, and taken to the platform, lies there at the risk of the passenger, if he is not ready forthwith, or the moment he has got his ticket, to step into the train.

It was said that if everybody acted as Mrs. Bunch acted in this case, railway companies would require an army of porters, and that it would be almost impossible for them to carry on their business. I quite agree; but I am not much impressed by that observation. I apprehend that if all travellers acted precisely alike, if everybody arrived at a station for a particular journey at precisely the same moment, though the time of arrival were the fittest that could be imagined, there would be no little confusion, and perhaps some consternation, among the railway officials. Whatever may be the result of your Lordships' judgment, there is no fear that it will have the effect of making everybody act alike. Some passengers will still give more trouble at the stations than others, but no one will give any more trouble for it. Things will go on just as usual. The fidgety and the nervous will still come too soon; the unready and the unpunctual will still put off

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their chance of arrival till the last moment, and the prudent may have their calculations upset by the many accidents and hindrances that may be met with on the way to the station. And it is just because of the irregularity of individuals that the stream of traffic is regular and easily managed.

In the result, therefore, I am of opinion that the majority of the Court of Appeal were right in the view they took. The nature of the case requires that a broad view should be taken. The contract between the company and the passenger is not a contract in writing, defining with mathematical accuracy the precise limits of the incidental services which the company are prepared to render, and punishing every transgression, every attempt on the part of the passenger to exact more than his just measure of attention, with the loss of that security which belongs to a contract by common carriers. Railway companies do their best to adapt the conduct of their business to the habits of the travelling public, who resent nothing so much as petty and vexatious regulations; and so the contract becomes moulded in matters incidental to its main purpose by that which is, and is known to be, the ordinary and every-day practice of railway companies. A narrow, technical and jealous view of the rights of individual passengers might, perhaps, enable railway companies to escape liability in some few cases: I much doubt whether it would tend to their advantage in the long run.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 24th February 1888.

Solicitor for appellants: *R. R. Nelson.*
Solicitors for respondents: *Ingle, Cooper & Holmes.*

[HOUSE OF LORDS.]

SEATON AND OTHERS . . . . . APPELLANTS; H. L. (E.) 1888 Feb. 28.

AND

LOUISA CHRISTIAN SEATON AND EDWARD BUCKMASTER (EX PARTE AS TO BUCKMASTER) . . . . . RESPONDENTS.

Infant—Married Woman—Ward of Court—Post-nuptial Settlement—Reversionary Interest in Personal Estate—Jurisdiction of Court—Infants' Settlement Act, 1855 (18 & 19 *Vict.* c. 43).

The Infants' Settlement Act 1855 (18 & 19 Vict. c. 43) removed the disability of infancy only, leaving unaffected the disability of coverture.

In 1862 an infant ward of Court married without the sanction of the Court. An inquiry as to her fortune having been shortly afterwards directed by the Court, a post-nuptial settlement was executed by her in 1863 with the approval of the Vice-Chancellor, whereby she settled her property, a reversionary interest in personalty under a will, upon trusts for herself for life with remainder for the children of the marriage. The testator having died before Malins' Act (20 & 21 Vict. c. 57) came into force, that Act had no application. There was issue of the marriage. During coverture the wife recognised the settlement by various acts, and after a dissolution of the marriage had been decreed on her petition, she successfully petitioned the Probate Divorce and Admiralty Division to vary the terms of the settlement. The reversionary interest having fallen into possession after the dissolution of the marriage:—

Held, affirming the decision of the Court of Appeal (35 Ch. D. 21), but without deciding whether the Infants' Settlement Act 1855 applies to a post-nuptial settlement, that neither the sanction of the Court nor the effect of that Act could make the settlement of the wife's reversionary interest in personalty binding upon her; that no acts of acquiescence and confirmation could have that effect unless they amounted (which these acts did not) to an actual disposition by her of the property (while discoverte) to the trustees of the settlement, and that she was entitled to a transfer of the property.

APPEAL from a decision of the Court of Appeal, reported as *Buckmaster* v. *Buckmaster* (1).

On the 18th of April 1862 Louisa Christian Buckmaster, aged eighteen, and a ward of Court, married Charles Seaton without the sanction of the Court. Wood V.C. having on the 15th of May ordered an inquiry whether a valid marriage had been had

(1) 35 Ch. D. 21.

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and of what the infant's fortune consisted, and what would be a proper settlement of it, the Chief Clerk in June 1863 certified that Mrs. Seaton's fortune consisted of an undivided share in reversion, expectant on the decease or second marriage of her mother, in the residuary personal estate of her father under his will, and that the settlement next mentioned was a proper settlement to be made of her fortune. This order and certificate were made in *Buckmaster* v. *Buckmaster*, a suit for the administration of the estate of Mrs. Seaton's father. By a settlement of the 9th of July 1863, Mrs. Seaton assigned all her interest in her father's residuary personal estate to trustees upon trusts for herself for life, with remainder for such of the children of the marriage as she and her husband jointly, or as the survivor should appoint, and in default of appointment for the children of the marriage equally at twenty-one or marriage, with ultimate trusts for her own benefit. The settlement contained a power of appointing new trustees with Mrs. Seaton's consent in writing. It was signed by the Chief Clerk as having been approved by Wood V.C., and was executed by husband and wife. There were issue of the marriage four children.

On the 19th of July 1873, upon a petition by (among others) Mr. and Mrs. Seaton, a sum of £5045 consols, part of the sum standing in Court to the credit of the cause as representing the testator's estate, was transferred to the trustees of the settlement as part of Mrs. Seaton's settled share, Mrs. Seaton's mother giving up her life interest.

By an indenture of April 1875, indorsed on the settlement, new trustees of the settlement were appointed with Mrs. Seaton's consent, she being a party to and executing the appointment, and releasing the retiring trustees.

In April 1882, upon Mrs. Seaton's petition, a decree nisi was made in the Probate Divorce and Admiralty Division for the dissolution of the marriage on the ground of her husband's adultery and cruelty, and this decree was made absolute in November 1882.

In May 1883 an order was made by the Probate Divorce and Admiralty Division, that (inter alia) the powers of direction and appointment given to the husband by the settlement in case he

should survive his wife should cease and determine, as if he had died in his wife's lifetime. This order was made upon a petition by Mrs. Seaton, which recited the settlement and prayed (inter alia) that it might be varied by extinguishing all the powers and interest of the husband therein, as if he were already dead. The other matters dealt with by the order are stated in Lord Herschell's judgment.

Mrs. Seaton's mother died in February 1886. Pursuant to an order made in June 1886, in *Buckmaster* v. *Buckmaster*, declaring that the testator's estate was divisible in tenths, one tenth of the fund in Court, representing such estate, was carried over to the credit of Mrs. Seaton's share "alleged to be settled" by the settlement of 1863. Mrs. Seaton then presented a petition alleging that the settlement was not binding on her and praying that the share so carried over might be transferred to her.

The Court of Appeal, reversing the decision of Bacon V.C. (1), held that the settlement was not binding on Mrs. Seaton, and ordered a transfer out of Court to her of the fund as prayed (2). Against this order Mrs. Seaton's infant children (by their father and next friend) appealed.

Feb. 27, 28. *A. G. Marten* Q.C. and *T. L. Wilkinson* for the appellants:—

The settlement of July 1863 was binding on Mrs. Seaton. There was abundant consideration, the husband giving up his right to after-acquired property and other rights. Ordinarily, no doubt, a married woman cannot deprive herself of her right to survivorship in the reversionary interest in her own personalty, but this settlement binds Mrs. Seaton for three reasons. First, the Court of Chancery has an inherent power to order a settlement in the case of its own infant ward, though there is no express authority to that effect. In the present case there was an order of reference to inquire what would be a proper settlement, and the settlement was in fact approved by Wood V.C. That was equivalent to an order for the ward to execute, though there was no actual order. The Court made a bargain for its infant ward, and the Court's approval shews conclusively that the settlement was

(1) 33 Ch. D. 482. (2) 35 Ch. D. 21.

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for the benefit of the infant. In terms the deed is irrevocable, and it must be construed according to its terms. A proper settlement for the infant's benefit would have been irrevocable even without the order of the Court. That an infant could make a binding marriage settlement for her benefit independently of modern statutes is shewn conclusively by *Earl of Buckinghamshire* v. *Drury* (1); and even of contingent interests: *Harvey* v. *Ashley* (2). In the Court of Appeal Cotton L.J. (3) seems to rely on *In re Murray* (4), and *Field* v. *Moore* (5), but the latter case is explained by Wood V.C. in *Barrow* v. *Barrow* (6).

Secondly, the effect of the Infants' Settlement Act 1855 (18 & 19 Vict. c. 43) is to make the settlement binding. The first clause of sect. 1 enables an infant with the sanction of the Court to make such a settlement, and the second clause enacts that the conveyance or assignment shall be valid. The first clause binds the property: the second does not restrict the general effect of the first; it merely provides the machinery for carrying out the contract. The Act gets rid of the disability of coverture.

[LORD HERSCHELL:—Would the Act make a settlement executed by an infant lunatic binding on her?]

Yes, in the case of a lunatic not so found by inquisition. It is impossible to suppose that the Court would sanction a settlement in the case of a lunatic so found by inquisition. That the Act applies to a post-nuptial settlement such as the present, made soon after or in connection with the marriage, is well settled; *Powell* v. *Oakley* (7); and *In re Sampson and Wall* (8); and see *In re Phillips* (9). The words of the Act expressly include reversionary interests in personalty, and since the Act applies to post-nuptial settlements it must remove the restriction on dealing with such interests arising from coverture. The restriction itself was soon after put an end to by Malins' Act (20 & 21 Vict. c. 57), which has no application to the present case, the will of Mrs. Seaton's father having come into operation before that Act.

(1) 2 Eden. 39, 60; 3 Bro. P. C. (Tomlins' ed.) 492.
(2) 3 Atk. 607, 609, 613.
(3) 35 Ch. D. 30.
(4) 3 D. & War. 83.
(5) 7 D. M. & G. 691.
(6) 4 K. & J. 409, 418, 422.
(7) 34 Beav. 575.
(8) 25 Ch. D. 482, 492.
(9) 34 Ch. D. 467.

Thirdly, Mrs. Seaton is estopped by her conduct from disputing the validity of the settlement. She obtained the advance of £5000 in 1873 upon the footing of the settlement being valid. She concurred in appointing new trustees of the settlement, and gave a release. After she had obtained a dissolution of marriage and coverture had therefore ceased she obtained from the Probate and Divorce Division a modification of the settlement, putting it forward as a valid one, and having then full power to confirm it. That Court has under 22 & 23 Vict. c. 61 s. 5 power to make an order affecting the interests of third parties created before the petition to vary the settlement: *Wigney* v. *Wigney* (1).

These acts constitute an acceptance and confirmation of the settlement and create an estoppel: *Milner* v. *Harewood* (2); *Merryweather* v. *Jones* (3); *Ashton* v. *McDougall* (4); *Davies* v. *Davies* (5); *White* v. *Cox* (6); *Wilder* v. *Pigott* (7); *Mills* v. *Fox* (8).

Fischer Q.C. and *B. B. Rogers* for the respondent Mrs. Seaton were not heard.

LORD HERSCHELL:—

My Lords, this appeal arises upon a petition by Louisa Christian Seaton praying for the payment to her of a sum of about £20,000 consols, being her share of the residuary estate of her father William Buckmaster under his will made in the year 1838. Down to the month of February 1886 she was entitled to this share of her father's residuary estate in reversion only, expectant upon the death of her mother.

On the 28th of April 1862 the petitioner, being then eighteen years of age, married. She was a ward of Court, and an administration suit for the administration of her father's estate was pending. She married without the sanction of the Court and as it appears without the knowledge of her mother. On the 15th of May 1862, very shortly after the marriage, an order was made by the Court of Chancery for an inquiry whether a valid marriage had been had between the ward Louisa Christian and Charles

(1) 7 P. D. 228.
(2) 18 Ves. 259.
(3) 4 Giff. 509.
(4) 5 Beav. 56, 65, 66.
(5) Law Rep. 9 Eq. 468.
(6) 2 Ch. D. 387.
(7) 22 Ch. D. 263.
(8) 37 Ch. D. 153.

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Seaton, and if so of what the infant's fortune consisted and what would be a proper settlement to be made of it. On the 27th of June in the following year the chief clerk made his certificate finding that a valid marriage had been solemnized between Louisa Christian and Charles Seaton, and finding what property she was entitled to and the terms of the settlement which it was considered would be proper. On the 9th of July 1863 a marriage settlement was executed by Charles and Louisa Christian Seaton. It is not necessary that I should detain your Lordships by a statement of the provisions of that deed of settlement; it was in a form which is very common in the case of settlements made upon marriage. It contained (and I think this is the only matter to which I need allude) a power of appointment over the settled property to be exercised jointly by the husband and wife during their lives and on the decease of either of them by the survivor. It was a settlement of the entire interest which the wife possessed under the will of her father.

Upon the death of the tenant for life in February 1886 this petition was presented by Mrs. Seaton praying for the payment to her of her share of the residuary estate. She was at that time divorced from her husband. I shall have occasion hereafter to allude to the divorce proceedings; but for the present it will be sufficient to state that she was in the same position as if she had been a widow as regarded her right to the fund of which she claimed payment.

The only question is whether Louisa Christian Seaton is deprived of the right which she would otherwise possess to the payment out to her of this fund now in Court by reason of the settlement to which I have alluded which was executed in July 1863. Unless that settlement has effected a valid disposition of the property which came into possession in February 1886 so as to exclude her present right to claim it, there can be no question as to the validity of her claim.

Down to the time of Sir Richard Malins' Act (20 & 21 Vict. c. 57) a married woman could not make a valid disposition of her reversionary interest in personalty, and since that Act she can only do so with the formalities and in the manner pointed out by the Act.

I shall first of all consider the question raised with regard to the validity of the settlement, quite apart from the circumstances under which it was executed and the interposition of the Court of Chancery with regard to it, leaving those questions to be dealt with subsequently.

It has been argued, but somewhat faintly, that even prior to 1855 it was competent for an infant to execute a valid settlement which should dispose effectually of his or her property. For the purpose of establishing that proposition the case of *Earl of Buckinghamshire* v. *Drury* (1) was relied upon. That case has given rise to a great deal of criticism since the time when the decision in it was pronounced, and much disapproval has been expressed of it. I do not think it necessary to say much with regard to it for this reason. That case decides this and this alone, that it was competent for an infant by means of a marriage settlement to bar her right to obtain by virtue of the marriage an interest in her husband's property; and in the opinion expressed by Lord Mansfield he distinctly says, "I approve the distinction taken by Wilmot J. between infants contracting for conveying away something of their own and barring themselves of a right which is a third person's" (2). It is quite unnecessary to inquire whether that distinction is one which can be supported by reasoning or not. It is sufficient to say that whatever be the validity of the decision in that case it cannot be relied upon as an authority beyond this, that in certain cases an infant may deprive herself of rights which she would otherwise have possessed in the property of her husband.

I entertain no doubt that it was well settled prior to 1855 that an infant could not by a marriage settlement dispose effectually of his or her property. Accordingly the Act of 1855 (18 & 19 Vict. c. 43) was passed, which undoubtedly from that date gets rid of the disability arising from infancy. It is unnecessary to discuss the question what power there was prior to that Act in an infant to dispose of his property, because since that Act it is beyond possibility of question that the disability of infancy is absolutely removed where the sanction of the Court is obtained in the manner provided by the Act. Therefore in the present

(1) 2 Eden. 39, 60; 3 Bro. P. C. 492. (2) 2 Eden. 73.

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case any disability arising from the infancy of Louisa Christian Seaton may be entirely disregarded, inasmuch as the settlement was made after the date of this statute.

But then it is contended on behalf of the appellants that the statute had an operation more extensive than that to which I have alluded; that it got rid not only of the disability of infancy but of the disability of coverture also; because it would not avail the appellants in the present case to get rid of the disability of infancy unless they could get rid of that disability of a married woman to dispose validly of her reversionary interest, which, beyond all doubt, existed in the year 1855 when this Act was passed.

The first question which arises upon the construction of this enactment is whether or not it applies in terms to a post-nuptial settlement, the words of the statute being, "It shall be lawful for every infant upon or in contemplation of his or her marriage." In the case of *In re Sampson and Wall* (1) the majority of the Court of Appeal came to the conclusion that those words ought to be construed so as to include a post-nuptial as well as an ante-nuptial settlement, if the post-nuptial settlement was made on the occasion of the marriage so as to be connected with that event. I do not propose to express any opinion with regard to that decision one way or another. It is unnecessary, in the view which I take, to do so. But certainly those who pronounced the decision do not appear to have contemplated as a logical consequence of it that which the learned counsel for the appellants have contended does logically follow, namely, that the statute not only applies to post-nuptial as well as to ante-nuptial settlements but, because it applies to them, indicates an intention that an infant though married should have the full powers which the statute confers.

The reliance of the counsel for the appellants is placed upon the very ample language, as they assert, contained in the earlier part of this section. It appears to me to be impossible to construe an enactment of this description by taking it to pieces and looking at one part of the section alone and shutting your eyes to what is contained in another part closely and immediately

(1) 25 Ch. D. 482.

connected with it. The first part of the section no doubt provides that "it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder or expectancy." But after declaring that it shall be lawful for every infant to make a valid and binding settlement under those circumstances, the section proceeds, "and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment or assignment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years."

If the first part of the section stood alone I am by no means prepared to say that I should arrive at the conclusion that any disability was intended to be removed except that of infancy, or that it was intended to enable a settlement to be made which should be valid and binding in any other respect than as being so in spite of the infancy of the person making the settlement; because one must look at the avowed purpose and object of the Act, at the inconvenience recited in the preamble which it states the statute is intended to remedy. Infancy is the only matter there pointed to; and one cannot shut one's eyes to the fact that at the time when this legislation was passed it was perfectly well known that there existed in certain cases a disability, the disability of coverture, as familiar to the law as the disability of infancy; and if it had been intended to remove that disability also, I cannot conceive that the enactment would ever have been framed in the terms which we find in the statute with which we are dealing. I pointed out in the course of the argument that the contention on behalf of the appellants must really go further than its immediate purpose, which was to exclude the disability of coverture; for if the statute makes these dispositions valid and binding notwithstanding coverture, it seems to me that it must be equally read as making them valid and binding notwithstanding

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any disability of any kind which might otherwise affect their validity. I think it is impossible to put such a construction upon the section. I think too that the language to be found at the end of the section to which attention was called during the course of the argument, the proviso "that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant," points strongly to the fact that it was the disability of infancy and that alone with which the legislature were dealing when this Act was passed.

It is said that the words to be found in the earlier part of the section are general, and apply to interests of every description, including reversionary interests, such as a married woman is unable to deal with. The answer to that contention seems to me to be complete. A male infant might dispose of his reversionary interest; a female infant unmarried might dispose of her reversionary interest; and there is no difficulty therefore in giving effect to the whole of the language to be found in the earlier part of the section.

I have arrived, therefore, without any hesitation, at the conclusion that the enactment of 1855, though it got rid of the disability of infancy did not get rid of any other disability or enable a married woman to do that which undoubtedly down to that time she could not do, namely, make an effectual disposition of her reversionary interest during coverture.

That disposes of the main question in the case apart from the effect which is said to be given to the settlement by virtue of the authority of the Court of Chancery. There does not appear to have been any order, strictly speaking, that this settlement should be executed; but there can be no doubt that Charles Seaton having, without the consent of the Court, married a ward of Court, was in contempt, and the Court had power (a power which it constantly exercises) to prevent a person who in contempt had married a ward of Court, from obtaining a pecuniary benefit through the marital rights which he acquired, owing to the marriage, in the property of his wife. No doubt the power which the Court possesses of committing him for contempt gives it an authority which is effectual for the purpose of enabling it to compel him to renounce by means of a settlement those

marital rights, or at all events, so far renounce them as the Court thinks it proper to call upon him to do so. As regards the ward, I have heard no authority cited supporting the view that the Court has any power to order her to execute a settlement; for if it possessed such power it would follow that it would have power to commit her for contempt in not executing the settlement which it had so ordered her to execute. No authority has been produced to your Lordships' House supporting any such view, and there are certainly dicta of weight to the contrary.

It seems to me to be quite unnecessary to discuss the question which has been a good deal discussed before us, what power the Court would have over one of its wards in that respect. The Court sanctioned this particular settlement—approved its terms; but what more did the Court do than to approve its terms? The settlement was perfectly valid, effectual and binding, so as to prevent Charles Seaton from acquiring the absolute rights which would otherwise have been his owing to the marriage. But what is contended is this, that the settlement had, as regards Louisa Christian Seaton, the effect of disposing of property which she could not in point of law have made an effectual disposition of, but for the fact that the Court sanctioned this form of conveyance. I am at a loss to understand what authority the Court of Chancery possesses to make a disposition effectual which in law is not and cannot be made effectual at the time at which the Court so sanctions the disposition. And therefore I do not myself suppose, I refuse to suppose, that the Court of Chancery intended to do anything of the kind. This settlement was perfectly effectual, not only as regards Charles Seaton but as regards Louisa Christian Seaton, to a very considerable extent, even as regards what might have taken place with reference to the reversionary property; but I do not myself see any reason for believing that the Court of Chancery ever pronounced, or intended to pronounce, that it should be effectual to deprive Louisa Christian Seaton of the rights which, according to law, she would have possessed if the Court had not given its sanction to the deed. It seems to me that by giving its sanction to the deed it did not cause it to be effective in any other way or to any greater extent than it would have been if executed without the sanction of the Court. Of

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course, I am not alluding here to the question of the disability of infancy.

I am accordingly of opinion that the Court of Chancery did not, by its interposition in this case, render this deed more effectual to convey the reversionary interest than it would have been if the Court of Chancery had not intervened at all. No authority has been cited to shew that the Court would have had such a power if it had purported to exercise it. I do not think that the very general expressions of Lord Hardwicke in *Earl of Buckinghamshire* v. *Drury* (1), upon which Mr. Marten relied, establish that the Court possessed such a power. Quite apart from that I can see no ground for the contention that the Court has purported to exercise any such power or authority.

That, as it appears to me, disposes of the whole of the questions arising upon this appeal with the exception of the allegation that even if the settlement was not originally operative to pass this reversionary interest, it has nevertheless become so by the subsequent actings of Louisa Christian Seaton.

Three matters are relied on in support of that contention. First, it is said that she received the income which was provided for by a family arrangement made in December of the year 1861, which provision she was only to be entitled to in case she married with consent; that having received that provision from her mother, the tenant for life, she must be taken to have received it upon the basis of the settlement being a valid and binding one and one which would cover her reversionary interest. I confess that I am unable to follow the reasoning which would suggest that as a ground for holding that she is disentitled to the claim which she now makes.

The second point is that on the 19th of July 1873 £5000 was advanced for her benefit, part of the reversion to which she was entitled, and that that sum of £5000 was handed to the trustees, and became subject to the trusts of the settlement. No question arises here with regard to that £5000; she makes no claim to it, she does not insist that it is not a sum of money well settled and subject to the trusts of the settlement. But I do not see how the fact that she and her husband concurred in vesting

(1) 2 Eden. 60.

that money in the hands of the trustees affects in the least or invalidates her contention that she is now entitled to the remainder of her interest which fell into possession only after she became a feme sole.

The third matter is that on the 3rd of April 1875 she concurred in the appointment of new trustees of the settlement, and gave a release to the former trustees. That seems to me entirely consistent with her present claim; inasmuch as the £5000 was well settled, new trustees were needed for the £5000 even if that was the entire amount comprised in the settlement, and the outgoing trustees needed a release in respect of their dealings with the £5000.

With regard to all those three matters I have this further observation to make, that they occurred during the time when Louisa Christian Seaton was a feme covert; and if she could not by deed, however solemnly executed, dispose directly during her coverture of her reversionary interest, I am quite at a loss to understand how by any estoppel or actings or otherwise she can be held indirectly to have disposed of it.

One matter only remains. In 1881 Mrs. Seaton petitioned for a divorce from her husband, and on the 14th of November 1882 a decree was made absolute for a divorce; so that from that date she must be treated as a single woman, and after that date she unquestionably had power to dispose as fully of her reversionary interest as if she had never been married; and if she has done any act since that date which has validly disposed of that interest, no doubt she has deprived herself of the right to make the claim which she now insists upon. The appellants rely upon the petition which she presented after her divorce to the Divorce Court on the 23rd of November 1882, and on the order which was made upon it on the 1st of May 1883.

It appears that prior to her petition for a divorce she had obtained a judicial separation from her husband, and at that time, in 1879, an order had been made for the payment to him of a sum of £100 a year out of her income. After the divorce had been obtained she filed a petition containing three prayers: the first that she might no longer be required to make that payment of £100 a year—that the order for it might be discharged; the

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second that he might be ordered to contribute towards the support of herself and the children; and the third that his power of appointment, which he possessed jointly with her under the deed of settlement, might be put an end to. The matter was referred to the Registrar of the Divorce Court, and he reported that, looking to the income which she possessed and to the income which the husband possessed, there was no ground for an order for the payment by him to her for her support, but that he ought to contribute to the maintenance of two of his children. Upon that an order was made by the Divorce Court rescinding the order for the payment of £100 a year to him, requiring him to pay £125 a year towards the maintenance of his children, and depriving him of the power which he possessed of appointing under the deed of settlement in case he survived her.

That, so far as I know, is the only transaction to which this lady was a party, subsequently to the time when she is to be treated as a feme sole, which has been relied upon as shewing that she is now bound by the settlement and disposition which she made with regard to this property which came into possession in 1886. It is put first as an acquiescence in or confirmation of the settlement. I cannot understand how any acquiescence or confirmation could at that time be effectual which did not amount to an actual disposition of the property. It was property which at that time was hers and undisposed of; and I do not see how the steps which she then took amounted in any way to a disposition of it by her as effectual as if she had actually assigned it by deed to the trustees under the settlement.

Nor do I think it can be established that there has been any estoppel against her. At that time no doubt, so far as any disability was concerned it was at an end; and if it could be shewn that she had so acted or made such representations with reference to the existence of this settlement and its application to this reversionary interest as to lead other persons to act upon the faith that the settlement then covered it, so that they would be prejudiced in case it did not cover it, she might be estopped from denying that the settlement covered the reversionary interest. But it is impossible to say that the application to the Divorce Court had any such effect. Whom did it prejudice?

Who relied upon the representations? And further, how can they be construed as representations at all that the reversionary interest was included in, and effectually dealt with by the settlement which was referred to? The settlement existed and was effective and operative even if it did not touch this reversionary interest at all. I cannot see that she did anything more than bring the settlement before the Court; and the Court must be presumed to have known that the settlement would only be effectual as far as regarded an interest which a married woman was capable of disposing of.

On all these grounds I think that the judgment of the Court below was right, and I move your Lordships that it be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I am of the same opinion, and I agree with every one of the observations which have been made upon the details of this case by my noble and learned friend. Mrs. Seaton does not admit that her marriage settlement is within the provisions of the Act 18 & 19 Vict. c. 43; and seeing that we have not heard her counsel, I refrain from expressing any opinion on the points which were before the Court of Appeal in *In re Sampson and Wall* (1). But I am of opinion, with your Lordships, that the sole object and effect of the Act of 1855 is to remove disabilities arising from non-age; and that it does not give a minor lady during her coverture the capacity to bind her reversionary estate which an adult wife does not possess. In that view the provisions of the Act, assuming that they do apply to the settlement in question, cannot aid the appellants' case.

It was argued, however, by Mr. Marten that the fact of the settlement being executed with the sanction of the Court of Chancery, was of itself sufficient to give efficacy to Mrs. Seaton's assignment of her interests in reversion—in other words, that the Court meant to give and actually did give, the minor a power which the law denies to married women. I venture to doubt whether the Court of Chancery is possessed of any such jurisdiction; but it is needless to consider that point, because I am satisfied that

(1) 25 Ch. D. 482.

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in the present case the Court merely interfered for the protection of its ward, and intended that the settlement of which it approved should take effect according to its ordinary legal construction just as if it had been executed by a lady of full age during the subsistence of her marriage.

The appellants lastly contended that Mrs. Seaton has elected to abide by the settlement, or at least has estopped herself from claiming against it. It appears to me to be unnecessary to discuss the relevancy of the argument which was addressed to us in support of these pleas, because there are no facts in the case which can support them.

I have only to add that I entirely concur in the able and exhaustive judgments delivered in this case in the Court of Appeal.

LORD FITZGERALD :—

My Lords, this appeal presents two important questions of construction arising on the 1st section of the Infants' Settlement Act.

The first question is whether the decision in *In re Sampson and Wall* (1) on the 1st section is correct? It is not necessary for the House to express any opinion on that case so far as relates to that part of the decision which is represented by the judgment of Lord Selborne. It may be a useful decision, and certainly puts a very wide and benevolent construction on the statute; but we leave that case as we find it.

The second question is whether the 1st section went further than to release the infant wife from the disability of infancy? This question was so fully treated in the judgment of the Court of Appeal, and now by my noble and learned friend on the woolsack, that I do not find it necessary to say more than that I adopt the judgment of the Court of Appeal, which has been now accepted and approved of by my noble and learned friend. But that leaves untouched the disability arising from the coverture of Louisa Seaton, which could only be removed, as to the property in question, by a deed executed and acknowledged under the

(1) 25 Ch. D. 482.

provisions of the Act known as Malins' Act, if that Act applied to the case.

Then comes the question which Lord Cairns thus states in *Codrington* v. *Codrington* (1). That, it is true, was a case of election, but he puts it thus: "It is quite true as far as the interest of the appellant" (that is the wife) "was concerned, the settlement was ineffective." I may observe that it was a settlement of two funds, one of which was her reversionary estate—Rs.80,000—and she had to elect. He says: "She had it in her power when discoverte to repudiate" it (the settlement), "and to stand on her original rights, or she had it in her power in the same event to ratify and confirm" the settlement. We must bear in mind that this settlement now before us, so far as it relates to the reversionary interest of the minor wife in her share of the personal estate of her father, to use the words of Lord Mansfield, had no operation. The instrument was not void or inoperative for all purposes. It bound the husband and his marital rights, but as to her it was ineffective. We may assume, however, for the purpose of the discussion, that she might when she became discoverte ratify and confirm it.

I assume for the present that though the settlement was unquestionably void as against the infant wife, so far as it dealt with her reversionary estate, yet that she might when she became discoverte adopt and confirm it. I do not assert the proposition, but assume it. But the acts of confirmation relied on must be clear and unequivocal in their character, amounting in some shape to a gift of her right, and have taken place when she had a full knowledge of her position and of her rights.

Mr. Marten urged that she had knowledge of the settlement and must be taken to have been aware that it was as to her inoperative and that she had a legal right to repudiate and put it aside. That is to say, she must be taken to have had in her mental view the solution of the difficulties which puzzled and misled the Vice-Chancellor, which occupied so much of the time of the Court of Appeal, and are now brought up to this House for final decision. It is true that one of the maxims of the law is Ignorantia juris non excusat. Mr. Marten did not so put it in

(1) Law Rep. 7 H. L. 864.

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terms, but his argument amounted to and was based on that. The true meaning of that maxim is that parties cannot excuse themselves from liability from all civil or criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that parties must be taken to know all the legal consequences of their acts, and especially where difficult questions of law, or of the practice of the Court are involved. Lord Westbury in *Spread* v. *Morgan* (1), dealing with a question of election thus puts it: "It is true as a general proposition that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity" (the rule which applies to election); "election as a question of intention of course implies knowledge." So here, whether you call it confirmation, rectification, or acquiescence, the act relied on must have taken place with full and complete knowledge. Mrs. Seaton did not become discoverte until the judgment of the Divorce Court for the dissolution of the marriage became absolute on the 14th of November 1882, and her acts of confirmation, if any, must be looked for after that date. Mr. Wilkinson admitted, in answer to a question put to him, that there was but one such act, viz. the petition to the Divorce Court of the 23rd of November 1882. That petition necessarily recites some of the antecedent matters including portions of the settlement, and prays for the variation of the settlement by the extinction of certain powers of appointment and interest reserved to the husband. I entirely concur with my noble and learned friends that there is nothing in that petition, or in the report or order on it, which can reasonably and fairly be taken as a confirmation by Louisa Seaton of the settlement so far as it related to her reversionary interest in the fund in question.

LORD MACNAGHTEN:—

My Lords, I am surprised that the parties who were unsuccessful in the Court of Appeal should have thought it expedient to come to your Lordships' House. To my mind there never was a plainer case or one depending more entirely on elementary principles.

(1) 11 H. L. C. 602.

Under her father's will Mrs. Seaton became entitled to a share of personalty, not given for her separate use, and expectant on her mother's death. Her mother is dead, and she now asks for so much of her share as remains unpaid. The answer is, "The fund is no longer hers; it has been assigned to other persons, and theirs is the hand to receive it." We turn to the assignment. It is an assignment executed by Mrs. Seaton and by her late husband at a time when her interest was reversionary and the marriage subsisting. The assignment of the husband proves unavailing, because the fund did not fall into possession during the continuance of the marriage. As the lady was under the disability of coverture, to say nothing of the disability of infancy, the assignment purporting to be made by her is wholly inoperative unless it can be shewn that under some statute her assignment had an efficacy which it would not otherwise have possessed. Is there any such statute? The appellants say there is, and they rely on the Infants' Settlement Act. But I quite agree with what has been said by my noble and learned friends, that the disability of infancy is the only disability with which that Act deals.

The appellants certainly treat the Act in a very singular manner. They cut the principal section in two and desire to avail themselves of the first part of the mutilated section which they conceive to be favourable to them, without waiting for the qualification or explanation which finds its appropriate place at the end of the section. That is a singular way of construing an Act of Parliament.

But the most singular thing about this argument was that the appellants adopt that part of the section which is not relevant to the present question, and reject that part which is. Mrs. Seaton's application is made in the administration suit. In such a suit the Court has nothing to do with the trusts of derivative settlements. The only question is, whose is the proper hand to give a receipt? It is on the assignment contained in the settlement, not on the settlement apart from the assignment, that the appellants are compelled to rely. If there had been any inference to be drawn from the language of the first part of the section different from that to be drawn from the language of the second

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part (which in my opinion there is not), it would be enough to say that it is the second part not the first which is applicable in the present case.

Then it is urged that Mrs. Seaton has confirmed the settlement. The alleged acts of confirmation which are said to have taken place during the coverture may be laid out of consideration. It would not have bettered the appellants' case if Mrs. Seaton had re-executed this settlement every day during her coverture. What did Mrs. Seaton do after the coverture was determined? She applied to the Divorce Court. In her application she stated the settlement. She stated the settlement perfectly correctly. The only thing apparently that she omitted to do was this: she did not attempt to instruct the Divorce Court on an elementary point of equity law. It would have been irrelevant if not impertinent to have done so.

I take leave to say that if this lady had filed a bill to execute the trusts of the settlement it would not have bound her as regards the property not actually paid over to the trustees. There was a settlement; and property subject to it. It was a perfectly good settlement so far as related to the fund reduced into possession during the coverture.

It must be borne in mind that there is no question here of election. The husband settled nothing of his own. The wife was entitled to repudiate the settlement which is said to be hers when she became discoverte. By so doing she disappointed no one who had contributed to the settlement. She raised no question of election. To confirm the settlement (if that be the proper expression) it would have been necessary for her to have made a new gift. Until a gift be actually perfected, the donor may always withdraw.

In the particular circumstances of this case I do not see how the lady could have bound herself unless she had actually assigned her property or the property had been actually placed by her or with her consent in the hands of the trustees or she had done some act which would estop her from claiming the fund which was in truth her own.

As regards the extravagant powers attributed to the Court of Chancery, I agree in the observations of Lord Justice Cotton.

On these grounds I entirely concur in the motion which has been made.

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Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 28th Feb. 1888.

Solicitors for appellants: *Hadden, Woodward, McLeod, & Blyth.*
Solicitors for the respondent Mrs. Seaton: *Purkis & Co.*

[HOUSE OF LORDS.]

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DOWAGER DUCHESS OF MONTROSE AND OTHERS . . . . . } APPELLANTS;

AND

STUART . . . . . RESPONDENT.

Warrandice—Liability of Executor—Disposition with Warrandice Clause—Heir and Executor—Residue—Catholic Security—Act 31 & 32 *Vict. c.* 101, *s.* 8.

The grantor, by a disposition mortis causa dated 1853, conveyed his whole heritable and moveable estate to trustees for the purpose (inter alia), failing heirs of his own body, of conveying his estate of M. and his other lands in the county of Lanark to his brother under a strict entail.

By codicil dated 1876, and soon after his marriage, the testator disponed to his wife, in the event of her surviving him, the lands of B. and A., directing these lands to be excepted out of the lands directed by the deed of 1853 to be entailed; and bequeathed to her the whole residue of his estate. By a previous deed he appointed his wife as his sole executrix. The disposition of B. and A. to the wife contained a clause of warrandice in ordinary form under the Titles to Land Consolidation Act of 1868 (31 & 32 Vict. c. 101, sect. 8, sch. B.) which under sect. 8 imports an absolute warrandice. In 1882 he granted a bond and disposition in security for £250,000 over the estates of "M.," "B." and "A."

On the grantor's death his widow claimed that no part of the debt of £250,000 was payable out of B. and A. or out of residue, but that the whole debt was entirely chargeable against "M.":—

Held, affirming the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 131) that the testator had in imposing the obligation of warrandice used words limited in their significance to personal obligation, and that his widow as personal representative and executrix must herself discharge the obligation of warrandice.

APPEAL from the Second Division of the Court of Session, Scotland, on a special case (1).

(1) 14 Court Sess. Cas. 4th Series, 131.

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DOWAGER DUCHESS OF MONTROSE v. STUART.

Mr. William Stuart Stirling Crawfurd, of Milton, county Lanark, the testator, was married to the Dowager Duchess of Montrose, one of the appellants, on the 22nd of January, 1876. The other appellants are the testator's trustees. Mr. William Crawfurd Stirling Stuart, only son of Captain James Stirling Stirling Stuart, brother of the testator, became respondent by revivor on the death of his father.

The testator died on the 23rd of February, 1883, without issue, and survived by his wife the Dowager Duchess of Montrose. He left among other testamentary deeds a trust disposition and settlement dated the 21st of October, 1853, by which he conveyed mortis causa his whole estate heritable and moveable to trustees for the purpose, after paying debts and legacies, of conveying the estate of Milton and any other lands and heritages in the county of Lanark which should belong to him at his death to the heirs of his body, whom failing to his brother Captain James Stirling Stirling Stuart of Castlewick, and the heirs of his body, with a further destination under the fetters of a strict entail. By the same deed he directed his trustees to make over the whole residue of his estate failing his own issue to Captain James Stirling Stirling Stuart or the heirs of entail who should succeed to his lands and estates.

By his marriage settlement dated the 21st of January, 1876, the testator, as an addition for his wife, bound himself, his heirs and executors and representatives, to pay to her in case she survived him the sum of £50,000. And in security of this obligation the testator disponed to her certain superiorities forming part of the estate of Milton, and that in real security.

By a deed of nomination dated the 24th of July, 1876, the testator nominated his wife as his sole executrix.

By codicil dated the 1st of November, 1876, the testator on the narrative that he was desirous of making further provision for his wife in the event of her surviving him, in addition to the jointure and other provisions settled by their marriage contract, bequeathed to her the sum of £50,000 and further disponed to her "all and whole the lands of Balornock in the barony and parish of Glasgow, and the lands of Auchinearn in the parish of Calder and county of Lanark," and expressly excepted these lands from

the lands by his settlement of 1853 directed to be entailed, and directed his trustees to include in the entail the estate of Milton only. The codicil contained a description of the lands of Balornock and Auchinearn and then continued, "And I bind and oblige myself and my heirs and successors to grant all deeds and writings which may be necessary for making the foregoing conveyance and bequest of the said lands of Balornock, Auchinearn and others in favour of the said Duchess my wife and her heirs and successors valid and effectual to be held, the said lands and others hereby conveyed a me vel de me, and I resign the said lands and others for new infeftment or investitute: and I assign the writs: and I assign the rents from and after the period of my death: and I bind myself my heirs and successors to free and relieve the said Duchess my wife and her foresaids of all feu duties, casualties and public burdens payable by or in respect of such lands and others up to the said period. And I grant warrandice: and I do hereby further dispose and bequeath to the Duchess, my wife, in case she shall survive me, the whole rest, residue and remainder of my property and estate, real and personal, heritable and moveable, wherever situate, of which I may die possessed, with the exception of the said estate of Milton and others directed by me to be entailed as aforesaid."

At the date of Mr. William Stuart Stirling Crawfurd's death there was a bond and disposition in security for £250,000 affecting the lands of Milton and also the lands of Balornock and Auchinearn. This bond is dated the 9th and recorded the 13th of November, 1882.

The testator's testamentary writings giving rise to several questions, a special case was settled in which the parties were, of the first part, the testator's trustees; of the second part, Captain James S. S. Stuart, father of the present respondent; and, of the third part, the Dowager Duchess of Montrose.

The only question brought up on appeal was upon whom the liability for the debt of £250,000 fell. The Dowager Duchess of Montrose and the testator's trustees claimed that this liability fell wholly upon the estate of Milton. This claim was opposed by Captain James S. S. Stuart and now by his son, the respondent, on the ground that, assuming the Dowager Duchess to be

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entitled to have the estate of Balornock and Auchinearn relieved of all liability for the debt of £250,000 in respect of the clause of warrandice, that the obligation of warrandice was personal and prestable by the executrix and residuary legatee of the testator, and not by the legatee of a specific heritable subject, directed to be strictly entailed, and that therefore the estate of Milton is only chargeable with its own rateable proportion of the bond.

The question in the special case was as follows:—"Is the bond for £250,000 entirely chargeable against the estate of Milton, or, in a question between the party of the second part and the party of the third part, is the estate of Milton entitled to relief out of Mr. Stirling Crawfurd's residuary estate from a share thereof in the proportion of the respective values of Milton on the one hand and Balornock and Auchinearn on the other?

The Second Division of the Court of Session found, by an interlocutor dated the 26th of November, 1886, that the bond for £250,000 is not entirely chargeable against the estate of Milton, and that that estate is entitled to relief out of Mr. Crawfurd's residuary estate from a share in the said bond in proportion of the respective values of Milton on the one hand and Balornock and Auchinearn on the other."

On appeal,

1887. Nov. 15. *J. B. Balfour*, Q.C. (of the Scottish bar), and *Rigby*, Q.C., for the appellant, the Dowager Duchess of Montrose:—

The question is, the testamentary intention of Mr. Crawfurd. He first directs, by what is an absolute clause of warrandice—*Coventry* v. *Coventry* (1) and sect. 8, Act 31 & 32 Vict. c. 101—that his widow shall have Balornock and Auchinearn free from all debt at his decease, and after that clause of warrandice he gives her the whole residue of his estate. Therefore, he must have intended to give her these two estates free, and in addition the whole personalty. The respondent says that the obligation of warrandice is merely a personal obligation, and that if it was worked out it would be a money transaction, and therefore must be satisfied out of executry and not by the heir; but that

(1) 12 Court Sess. Cas. 1st Series, 895.

contention comes to this, that the testator took away with one hand what he had given with the other, and it gives no effect to the clause of warrandice.

Sir *Horace Davey*, Q.C., appeared for the appellants, the trustees.

The Solicitor-General for Scotland (*J. P. B. Robertson*, Q.C.), *C. K. Mackenzie* (of the Scottish bar), and *E. W. Byrne*, appeared for the respondent, but were not called upon.

LORD HALSBURY, L.C. :—

My Lords, in this case the question for your Lordships' decision appears to me to be clear beyond all doubt. Mr. Stirling Crawfurd appears to have left three estates, which were charged with a sum of £250,000. With respect to two of them he left them to his widow, the present appellant, with a clause of warrandice that they should be free from all obligations, of course including the proportionate part of this £250,000 to which by law they would be liable.

It is not denied that if nothing more appeared each of these three estates, the one (Milton) which went to the testator's brother and heir-at-law, and which was left to him by a sufficient disposition and not as heir-at-law, and the two which went to his widow, would be rateably chargeable with the payment of this £250,000. It is further apparently admitted that if the residuary estate had gone to a different person than the widow no such question as has been submitted at your Lordships' bar could have arisen, the fulfilment of that clause of warrandice would have been a personal charge and would have been a primary charge upon the executor, to be met out of personal estate; and the only question which appears to be suggested is this, that inasmuch as the same person who occupies the position of disponee of these two smaller estates is also executrix and residuary legatee, one must construe the testamentary disposition as a whole and look at all that was intended to operate, and assume that although there is no express disposition to that effect we must read into these testamentary dispositions such operative words as to free these smaller estates

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from the obligation which would otherwise rest upon them. That contention appears to be grounded upon a misuse, I think, of the words "residuary estate." I could imagine a case being presented to your Lordships in which, if the facts could be established to raise such an argument, it might be plausibly contended that it would be impossible to suppose that the testator meant to render null and of no effect a disposition which he had made; and if it could be established that to the knowledge of the testator these two estates would be entirely swallowed up by the obligations which were charged upon them, and that the effect of the disposition when looked at as a whole would be to give his widow absolutely nothing, it would be a plausible argument to contend that we must suppose that he had some object in making the disposition to his widow and that he could not have intended merely to make disposition on paper, the result of which, taken as a whole, would be to give her absolutely nothing.

My Lords, no such case arises here before your Lordships. The legal operation and effect of the language used, and its technical import, are not denied. And when one speaks of the residuary estate it is a fallacy to speak of the residuary estate as if it were an ascertained something. The residuary estate, although it is a compendious and convenient form of expression, means that which remains after the obligations which primarily rest upon the personalty have been discharged; and it seems to me that there is no inconsistency in reading the two propositions together:—"I leave one of these two estates to my widow, and after she has discharged all the legal obligations, including this and all other legal obligations to which the personalty is liable, I also make her the person who shall benefit by my bounty in receiving all that remains after the discharge of this obligation." My Lords, that seems to me to be the rational mode of dealing with these dispositions, reading these testamentary instruments together. Under those circumstances it appears to me that the supposed inconsistency, the supposed conflict of intention which is suggested as arising, is entirely disposed of.

My Lords, I therefore agree entirely with the judgment pronounced by the Court of Session, which I think, following the language of the question put to them by the parties, is suffici-

ently accurate to shew what they intended to convey; and under these circumstances I move that the appeal before your Lordships be dismissed and the interlocutor affirmed with costs.

LORD WATSON:—

My Lords, I agree with the Lord Chancellor in thinking that this is a very simple case. I have heard nothing in the course of the ingenious arguments of the learned counsel to suggest any doubt as to the propriety of the judgment of the Court of Session.

The various writings which have been brought under the notice of your Lordships must, I think, be read as one deed constituting the settlement of Mr. Stirling Crawfurd. In noticing the terms of his settlement it is sufficient to refer to those provisions which directly bear upon the question argued before us with regard to the warrandice of the conveyance to the lands of Balornock and others. He constitutes the appellant his executrix and universal trustee of his estate, which imposes upon her the character of his personal representative, liable to the payment of his moveable debts. Then he gives her a legacy payable by herself in that character of £50,000. Then he conveys to her two estates with warrandice, and imposes upon her, as his personal representative, in language technical and of well known application in the law of Scotland, an obligation to make good that warrandice; and after all these provisions are made he bequeaths to her the whole residue of his estate. What is the residue of his estate? It is simply so much of his personal means as may remain after the whole antecedent purposes of the deed have been effected, after debts and legacies have been paid, and the obligation of warrandice discharged.

But it is urged that as the result of these provisions, we must in point of fact infer that the testator did not mean to charge his personal representative with the burden of the warrandice, and that he meant to impose the obligation upon the fee of the entailed estate. If that was his meaning, it is a singular thing that he should have used words which are ineffectual to create a real burden, and are constantly used by Scotch conveyancers to import an obligation affecting personal representatives.

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LORD MACNAGHTEN concurred.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 15th Nov., 1887.

Agents for appellants: *Grahames, Currey & Spens, for John Clerk, Brodie & Sons, W.S., Edinburgh.*

Agents for respondent: *Baileys, Shaw & Gillett, for Graham, Johnston & Fleming, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1888 *Feb.* 24.

COOPER . . . . . APPELLANT;

AND

COOPER AND OTHERS . . . . . RESPONDENTS.

Husband and Wife—Contract of Marriage—Infant domiciled abroad—Exclusion of Terce and Jus Relictæ—Application of English Law—Evidence—Absence of Proof of English Law—Judicial Notice by House of Lords.

The appellant, the widow of a domiciled Scotchman, brought an action in the Court of Session for the reduction of an ante-nuptial contract by which in consideration of a provision made by her husband she purported to discharge her legal rights of terce and jus relictæ. The contract was executed in Ireland by the appellant, who was then an infant domiciled in Ireland, but it was contemplated that she and her husband should reside, and they actually resided, during their married life in Scotland. The grounds upon which the appellant sought to obtain reduction of the contract were, that being an infant she was incapable of contracting by the law of Ireland, and minority and lesion according to the law of Scotland, but no evidence was adduced before the Court of Session as to the Irish or English law with regard to the capacity of an infant to enter into contracts:—

Held, first, that notwithstanding the absence of such evidence in the Court below, the wife's incapacity according to Irish law being a substantial ground of reduction on the record, it was competent for the House on appeal to take judicial notice of the English law prevailing in Ireland. Secondly, that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of her domicil (i.e., the Irish or English law), and that under such law she could not as an infant incur an obligation which was not shewn to be for her benefit, and that she was therefore at liberty to avoid the contract and claim her legal rights as a Scotch widow.

APPEAL from the Second Division of the Court of Session, Scotland (1).

(1) 12 Court Sess. Cas. 4th Series, 473.

Henry Ritchie Cooper was married to the appellant, Mary Jane Butler, in Dublin in October, 1846. At the date of the marriage the husband was a domiciled Scotchman, and the appellant had at that time her domicil in Ireland; and was a minor, being about eighteen years of age. Her father had been for several years dead; but her mother, with whom she resided, was alive. She had no legal guardians, and her nearest relation, except her mother, was a Mr. Tench, her maternal grand-uncle.

A contract of marriage was executed at Dublin by which the said parties have accepted, and do hereby accept, of each other for lawful spouses, and they promise to solemnize the bond of marriage with all convenient speed agreeably to the rules of the church; in contemplation of which marriage the husband bound himself, his heirs, executors, to pay to the appellant, in the event of her surviving him, an annuity or yearly payment of £80 sterling, which provisions the appellant accepted in full satisfaction of all terce of lands, half or third of moveables, and every other thing that she, jure relictæ or otherwise, could ask, claim, or demand from the husband, in case she should survive him, or that her executors or nearest of kin could ask, demand, or claim of him by or through her death, if she should predecease him, saving always and excepting whatsoever provisions the husband might make in her favour of his own free will and accord: declaring that in the event of a separation taking place the said parties, whatever may be the cause of such separation, the said Mary Butler shall be entitled to an annual allowance from the said Henry Ritchie Cooper for her support equal in amount to, but not exceeding the annuity hereby provided to her in case of her surviving him; for which causes and on the other part the wife thereby assigned and made over to and in favour of the husband the whole property then belonging to her, or which might become due, or shall belong to her during the subsistence of the said marriage.

This contract was signed by the two contracting parties, J. V. Horan, solicitor, and Charles FitzGerald, solicitor, also by the appellant's mother, as consenting to and ratifying the contract of marriage.

After the marriage the appellant and husband went to reside in Scotland. In 1863 circumstances arose which caused the

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appellant to leave her husband's house. On the appellant being induced to return to her husband, he by deed bound himself in the event of a subsequent separation taking place between him and the appellant to make payment to her during their joint lives of £200 per annum with a further allowance for each child (when more than one) residing with her.

Upon the same date as this deed of agreement the husband executed an unilateral bond of provision by which he bound himself, &c., to pay to the appellant in the event of her surviving him an annuity of £200; and to the children of the marriage £8000 sterling. Mr. Cooper in this bond declared that the provision therein in favour of his wife was in full of all terce, jus relictæ, and other claims competent to her at his decease, whether at common law or under contract of marriage.

This deed was executed with the knowledge of and by arrangement with the appellant's legal adviser. On the marriage of one of the daughters of the marriage, the appellant in 1876, at her husband's request, signed a deed of apportionment rendered necessary by the terms of the bond of provision of 1863.

In 1865 the appellant left her husband, and again in 1866; but she returned and continued to live with him until his death on the 14th of June, 1882.

The husband left a trust disposition and settlement by which he directed his trustees to pay to the appellant, his widow, £200 a year in full to her, and in lieu and place of all claims of terce, half or third of moveables, interim aliment or mournings, and every other claim legal or conventional; and in particular in full satisfaction to her of the whole provisions conferred upon her, whether by ante-nuptial contract of marriage, or by any post-nuptial deed or bond of provision. He also directed to be paid to her during her life the income of a sum of £900, which had been conveyed to him in trust by her mother in 1866.

On her husband's death the appellant raised this action against his trustees and his children as beneficiaries under his settlement, concluding for (inter alia) reduction of the contract of marriage of 1846, and the bond of provision of 1863, "In so far as affecting the pursuer, and in particular as they bear or may be held to imply an acceptance by her of the pretended

provisions therein contained in her favour, as in lieu of her legal rights of terce or jus relictæ, or in so far as they might be held as constituting any legal bar in the way of her now claiming and asserting her right as against her deceased husband's estate to her terce and jus relictæ."

In the Court of Session the appellant also claimed that she was entitled to the dividends from 1866 on the £900 paid by her mother to Mr. Cooper, but no question as to that was in issue in this appeal.

The appellant averred as follows:—

(Cond. 1.) "The pursuer at the date of her marriage was, according to the law of Ireland, an infant, and she had no legal guardian. It was the purpose and intention of the spouses when they married that they should thereafter reside in Scotland, which they accordingly did from the first, and during the whole period of the existence of the marriage."

(Cond. 6.) "Although the contract of marriage was subscribed in Dublin, it is in the Scotch form, and was prepared by the husband's law agent in Glasgow (who also had been the agent of his father and of his father's testamentary trustees, and generally of the Cooper family). The contract was subscribed after the marriage, and in so far as it affects the pursuer's legal rights as widow of Mr. Cooper she revokes the same as donation inter virum et uxorem. Before subscribing the said contract its terms had not been made known to or considered by her. Its provisions in her favour are grossly inadequate. The pursuer was at the time a minor; she subscribed the document at the request of Mr. Cooper, in total ignorance of what her common law rights as the wife or widow of a Scotchman were or would be, and in ignorance also of Mr. Cooper's pecuniary position at the time, and his pecuniary prospects for the future. With reference to the addition to their answer made by the defenders by way of amendment (and assuming, but not admitting that the law of Ireland is applicable), it is denied that the law of Ireland is as stated; and it is explained that, according to that law, the pursuer, being an infant in 1846, was incapable of contracting to the effect of discharging or renouncing the claims that would, according to the law of Scotland, be competent to her if she survived her husband, for jus relictæ, terce, and aliment; and farther, that by the law of Ireland, her acceptance of the £80 a year in lieu of these claims is reducible, in respect that that annuity was neither certain nor competent—meaning thereby, that it was precarious, unsecured, and inadequate; and separatim, in respect that she was in ignorance of Mr. Cooper's pecuniary circumstances and of her legal rights, and had no legal guardian."

Defendant's Answer (22.) "Denied that the pursuer was entitled to make any of the said claims put forward by her. Explained that the pursuer was at the date of the marriage a domiciled Irishwoman. So far as regards her capacity to enter into an ante-nuptial contract with her intended husband, in reference to the provision to be made by him for her in the event of his death, the pursuer was subject to the law of Ireland. By the said law, the pursuer was

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capable of entering into the contract now under reduction, and by the said law, the contract, so entered into by her, was not reducible on any of the grounds alleged by the pursuer."

The material pleas in law for the pursuer, were :—

(1.) "The contract of 1846 should be reduced and set aside in respect (*a.*) that the pursuer was at its date in minority; (*b.*) lesion—inasmuch as the provision thereby made to her was grossly inadequate, precarious, and unsecured; (*c.*) that she was in ignorance of Mr. Cooper's pecuniary circumstances and of her legal rights, and had no legal guardians; (2.) Separatim. The said contract having been executed after the marriage, is not binding on the pursuer, who revokes the same, in so far as it surrenders any of her legal rights as being a donation inter virum et uxorem; (4.) the bond of provision by Mr. Cooper being a unilateral deed, the pursuer is not bound by anything it contains; and in any view, as she repudiates and revokes it, she is entitled to have it reduced and set aside, in so far as it bears that the provision it purports to make for her is in full of her terce and jus relictæ."

The material plea for the defenders was as follows :—

(3.) "The pursuer having been a domiciled Irishwoman at the date of her marriage, and the deeds libelled not being reducible by the pursuer by the said law on any of the grounds stated by the pursuer, the defenders are entitled to absolvitor from the reductive conclusions of the summons."

The defenders' plea, being of a preliminary character, was first disposed of by the Lord Ordinary by an interlocutor dated the 31st of May, 1884, by which his Lordship repelled the plea (1), and appointed the cause to be put to the roll for further procedure. The appellant acquiesced in this interlocutor; and neither party reclaimed against it to the Inner House; nor was any evidence led in the Courts of Session as to what Irish law was in respect to contracts made by minors.

The evidence adduced before the Lord Ordinary as to the time of the execution of the marriage contract and under the head of minority and lesion is referred to in the judgments of the Courts of Session, but it is unnecessary to state it in detail.

On the 31st of July, 1884, the Lord Ordinary pronounced an interlocutor dealing with the whole facts of the case; the following being the portion now appealed from, "That in the circumstances of this case, there has not been lesion so as to entitle the pursuer to reduction of the contract; therefore assoilzies the

(1) See for full judgment 12 Court Sess. Cas. 4th Series, at p. 477.

defenders from the conclusions for reduction of the said contract of marriage;" and also the words "Finds it unnecessary to deal with the conclusion for reduction of the said bond, seeing that the terce and jus relictæ are validly renounced in the marriage contract which stands unreduced."

The appellant lodged a reclaiming note against this interlocutor to the Second Division, and their Lordships (Lord Rutherfurd Clark dissenting), on the 9th of January, 1885, pronounced an interlocutor, the following words being appealed against, "Refuse the reclaiming note and adhere to the interlocutor reclaimed against; find the defenders entitle to the expenses incurred by them in the Inner House since the date of the said interlocutor: remit to the auditor to tax the same and to report" . . . "with power to decern for the amount of the expenses now found due when taxed" (1). Interlocutors of the Lord Ordinary of the 31st of January, 1885, and the 5th of February, 1885, so far as they related to expenses, were also brought up for review. The appellant also appealed against the interlocutor of the Lord Ordinary of the 31st of May, 1884, so far as regards the words "repels the third plea in law stated for the defenders," although the said interlocutor was not reclaimed against to the Inner House.

Nov. 10, 11, 14. *Rigby*, Q.C., and *Ed. T. Salveson* (of the Scottish Bar), (with them *William F. Hamilton*), for the appellant:—

The question as to the appellant's capacity to bind herself by the marriage contract can only be decided by reference to the law of her domicil before marriage, namely by the law of Ireland, which is the same as the English law. If by the Irish law she was incapable by reason of her infancy of binding herself by any contract she might enter into, or if the contract so entered into was voidable at her option, then the marriage contract in question cannot operate as a bar to her now claiming the legal rights which she has acquired as the widow of a Scotchman.

The Lord Ordinary in repelling the third plea in law for the defenders by the interlocutor of the 31st of May, 1884, only

(1) 12 Court Sess. Cas. 4th Series, 473.

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decided that the law applicable to the contract was the law of Scotland; he decided nothing as to whether or not by Irish law a minor was capable of entering into a valid contract. That interlocutor, although not reclaimed against to the Inner House is now one of the interlocutors appealed from, and this House being an Irish as well as a Scotch Court, and therefore cognizant of Irish law, must take notice of that interlocutor, if necessary for the justice of the case. That it can be reviewed by this House is shewn by the proviso to the 15th section (1) of the 48 Geo. 3, c. 151. And under s. 52 of the Court of Session Act of 1868 the appellant's reclaiming note from the interlocutor of the 31st of July, 1884, brought up all the interlocutors previously pronounced (2). In *Gemmill* v. *McAlister* (3) it was intimated that, if it was necessary for the proper disposal of the case, this House would not hesitate to deal with an interlocutor not entertained by the Inner House; see also *Alexander* v. *Officers of State* (4). There may have been an omission in the Court of Session, in not requiring evidence of Irish law, but that cannot make the case worse than if the Court had acted—as it must—on evidence tendered by the respondent, and therefore going all one way; and such evidence was proved to be incorrect. In *Macpherson* v.

(1) The 15th section of 48 Geo. 3, c. 151 is (inter alia) as follows: "Nor shall any appeal to the House of Lords be allowed from interlocutors or decrees of Lords Ordinary which have not been reviewed by the judges sitting in the Division to which such Lords Ordinary belong: provided that when a judgment or decree is appealed from it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as is necessary, may be brought under the review of the House of Lords."

(2) Sect. 52 of the Act of 31 & 32 Vict. c. 100 is (inter alia) as follows: "Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date; not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary; and without the necessity of any counter reclaiming note."

(3) 1 Court Sess. Cas. 3rd Series (H.L.) 1; 4 Macq. at p. 458.

(4) 6 Court Sess. Cas. 3rd Series (H.L.) 54; Law Rep. 1 H. L., Sc. 276.

Macpherson (1) a question arose on an English will, and the Court of Session ordered that a case upon a point of English law should be laid before English counsel; and on receipt of that opinion the Court acted on it, as the only means they had of knowing what the English law was, but this House took notice of that opinion and reversed the decision, holding that the opinion was wrong in law. Lord St. Leonards, L.C., there said: "Your Lordships from your superior knowledge, are able to set right an erroneous opinion upon any question of English common law or equity; and there ought to be nothing to prevent the House from doing so in the exercise of its appellate jurisdiction, where the question though foreign to the Scotch Court is not foreign to this the highest Court of Judicature." Neither is the appellant personally estopped because she obtained a judgment from the Lord Ordinary and did not argue it in the Inner House. Lord Brougham, L.C., said in *Luke* v. *Magistrates of Edinburgh* (2): "If I had been satisfied that the pleadings in the Court below entitle a party to insist on an objection, and that the objection, if competent to be insisted on, was valid, I should not have considered myself precluded from advising your Lordships to decide, and I should not have considered that your Lordships were precluded from deciding, the question," upon the ground alone that it was not insisted upon in the Court of Session, nor formed part of the consideration of their Lordships in pronouncing the interlocutor appealed from. Then what law applies in the question, can an infant be bound by his contract? No doubt there is still a difference of opinion whether the law of the domicil or of the place where the contract is made ought to prevail: Westlake, Priv. In. Law, 2nd ed. 44: but no suggestion has been made but that capacity to act must depend on the law of the domicil: see Story on Conflict of Laws, ch. 4, s. 64. In Fraser on Parent and Child, 2nd ed., p. 576, it is said: The law of Scotland "must in consistency with itself hold minority to be a purely personal matter, depending on the lex domicilii." See also Lord Westbury in *Udny* v. *Udny* (3); Dicey on Domicil, p. 179. *Sottomayor* v. *De Barros* (4) decided that the parties

(1) 1 Macq. at p. 248.
(2) 15 August, 1832. 6 W. & Sh. at p. 254.
(3) 1869. Law Rep. 1 H. L., Sc. 457.
(4) 1877. 3 P. D. at p. 5.

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being by the law of their domicil under a personal disability to contract marriage, their marriage ought to be declared null; there Cotton, L.J., said, "It is a well-recognised principle of law that the personal capacity to enter into any contract is to be decided by law of the domicil," see also *Mette* v. *Mette* (1).

[They then argued that there was sufficient proof of lesion in the Court below, but it is unnecessary to state this part of the argument.]

At all events the contract was not signed until after the ceremony of marriage, and therefore being post-nuptial is revocable by Scottish law as a donation inter virum et uxorem (2).

The Solicitor-General for Scotland (*J. P. B. Robertson*, Q.C.) and *E. W. Byrne*, for the respondents:—

The appellant cannot at this stage of the proceedings claim a reversal of the judgment of the Court of Session by shewing that by the law of Ireland she could not bind herself by the contract of marriage. The pleadings shew conclusively that she founded her case solely on Scottish law. She obtained the Lord Ordinary's interlocutor of the 31st of May, 1884, and must be held to have deliberately elected to exclude the consideration of Irish law. The proof having been closed, the appellant is unable to shew that the Irish law is as she now states; and the cases go no further than this, that the House will deal with the evidence as given in the particular cases before it. Then assuming the question of Irish law was raised and decided by the Lord Ordinary, his Lordship's interlocutor of the 31st of May, 1884, cannot now be appealed against. By 48 Geo. 3, c. 151, s. 15, it is enacted that there is to be no appeal to this House unless the interlocutor is reviewed by the Court of Session. And although 31 & 32 Vict. c. 100, s. 52, provides that a reclaiming note to the Inner House shall bring up all interlocutors of the Lord Ordinary, the judicial mind of the Court of Session must be brought to bear upon an interlocutor before it is reviewed

(1) 1859. 1 Sw. & T. 416.

(2) *Hunter* v. *Dickson*, 5 Court Sess. Cas. 1st Series (1st ed.), 248; 5 W. & S. 455; *Thomson* v. *Thomson*, 16 Court Sess. Cas. 1st Series, 641; *Blakie* v. *Milne*, 1 Court Sess. Cas. 2nd Series, 18; *Mitchell* v. *Mitchell's Trustees*, 4 Court Sess. Cas. 4th Series, 800.

here: *Pursell* v. *Elder* (1). The proviso in the 48 Geo. 3, c. 151, s. 15, only means that no interlocutor shall be in the way of a reversal of the interlocutor immediately under appeal; such an interlocutor, for instance, as refers to costs. Assuming that it is open to the appellant to rely on her domicil, the facts remain that the husband was a domiciled Scotchman, the matrimonial domicil and the form of the contract were Scotch, and the right claimed arose under that law. In these circumstances the law of the domicil of the wife ought not to decide the validity of the contract, and what remedies she had, but the law of Scotland: see Lord Eldon in *Male* v. *Roberts* (2); Story's Conflict of Laws, ss. 103, 203, 242, 280; Dicey's Domicil, 177, rule 31.

On the other hand, granting that the Irish or (which is the same thing) the English law is as stated, and does govern the contract; by that law the contract, assuming it may be for the infant's benefit, is, until set aside, a valid and binding contract: see Jessel, M.R., in *Smith* v. *Lucas* (3); and in *Keane* v. *Boycott* (4) will be found what would be taken to be for an infant's benefit. Then, in *Burnaby* v. *Equitable Reversionary Interest Society*, Pearson, J. (5), after citing *Smith* v. *Lucas* (3), said that if the infant does nothing to disclaim the deed it is good. And, secondly, the contract of an infant can be ratified and confirmed during coverture, and when ratified is as binding as if made by a person sui juris: *Wilder* v. *Pigott* (6); *Barrow* v. *Barrow*. (7) And, although evidence as to ratification was not led in the Court of Session, there is here sufficient evidence of ratification after majority. The right of terce and jus relictæ is very similar to the right of dower and the right of thirds by the custom of London; and if so, such cases as *Drury* v. *Drury* (8) and *Davila* v. *Davila* (9) apply. As to the contract being post-nuptial, ex facie it bears to have been executed in view of the intended marriage; and it was the contract on which the marriage took effect, and, therefore, for all purposes is an ante-nuptial contract.

(1) 24 March, 1865. 3 Court Sess. Cas. 3rd Series (H.L.) 59.
(2) 3 Esp. 163.
(3) 18 Ch. D. at p. 543.
(4) 2 H. Bl. at p. 515.
(5) 28 Ch. D. at p. 423.
(6) 22 Ch. D. 263.
(7) 4 K. & J. at p. 419; see also *Cahill* v. *Cahill*, 8 App. Cas. 420; *Rich* v. *Cockell*, 9 Ves. 378.
(8) 2 Eden. 38.
(9) 2 Vern. 724.

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Rigby, Q.C., in reply:—

The cases cited on ratification, election and satisfaction of dower do not apply. Jessel, M.R., in *Lucas* v. *Smith* (1) was dealing with a question of the wife's separate estate, with regard to which, as soon as the wife comes of age, she is a feme sole. There can be no question of election in such a case as this until the time came for enjoying the provision, namely, at her husband's death; if the wife takes the provision, then that is election of choice, and she cannot escape from it: but that is not the election referred to in the cases cited. (2)

Time having been taken judgment was delivered as follows:—

LORD HALSBURY, L.C.:—

My Lords, in this case the appellant, the widow of a domiciled Scotchman, seeks to set aside an ante-nuptial contract executed by her on the day of her marriage.

A question has been raised whether the contract was not in fact executed after the celebration of the marriage; but, without minutely considering the evidence, I am satisfied with the conclusion of the Lord Ordinary, that the contract was executed before the marriage, a conclusion which, indeed, is but feebly contested on the other side.

A Scottish widow is entitled to her jus relictæ and to her terce, unless they have been discharged; and the appellant seeks to remove the bar to these rights by setting aside the contract in question which, if unimpeached, discharges these rights.

My Lords, I think there has been some slight confusion between the question what forum can decide the controversy between the parties and what law that forum should administer in deciding it. Now it is admitted that the appellant was a domiciled Irishwoman at the time she executed the instrument in question. It is admitted she was a minor; and apart altogether from the remedy peculiar to Scottish jurisprudence of setting aside a contract which operates to the enorm lesion of a minor, a question

(1) 18 Ch. D. at p. 543.

(2) See as to doctrine of election, Earl Selborne in *Cahill* v. *Cahill*, 8 App. Cas. 426; *Rich* v. *Cockell*, 9 Ves. 378.

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to be determined in a great measure by the position of the parties and the provisions of the contract itself, the first question arises here whether a domiciled Irishwoman could bind herself at all, while a minor, by a contract executed in Ireland.

There can be no doubt as to what would be the rule of English law in this respect. The line of cases which were brought to your Lordships' attention upon the subject of provisions whereby the common law right of dower was extinguished seem to me beside any question in this case. The statute created the power of extinguishing the right to dower, and Courts of Equity have from time to time considered and acted upon their view how far the provision for the wife has complied with the conditions of the statute; but such cases have no relation to the question of a minor's capacity by his or her act to part with rights with which the law would otherwise invest them. None of these cases relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicil. Story has with his usual precision laid down the rule (Conflict of Laws, § 64) that if a person is under an incapacity to do any act by the law of his domicil, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam.

There is an unusual concurrence in this view amongst the writers on international law: qua ætate minor contrahere possit et ejusmodi respicere oportet ad legem, cujusque domicilii: Burgundus, Tract 2, n. 6. C'est ainsi que la majorité et la minorité du domicile ont lieu partout même pour les biens situés ailleurs: 1 Boullenois, Princip. Gen. 6. Quotiescunque de habilitate aut de inhabilitate personarum quæratur, toties domicilii leges et statuta spectanda: D'Argentré. So also J. Voet: Quoties in quæstione, an quis minor vel majorennis sit, obtinuit, id dijudicandum esse ex lege domicilii; sit ut in loco domicilii minorennis, ubique terrarum pro tali habendus sit, et contra.

It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule, and that as both parties contemplated a Scottish married

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life, and as a consequence a Scottish domicil, the principle I have spoken of does not regulate the contract relations of these two persons. I think two answers may be given to this contention. In the first place, I think it is a misapplication of the principle upon which the exception is founded. Here there is no contractual obligation to make Scotland the domicil, nor is there any part of the contract which could not and ought not to receive complete fulfilment even if (contrary to what I admit was the contemplation of both the parties) the place of married life should remain in Ireland as if they had emigrated altogether and gone to some other country.

But another and a more overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails.

Two other considerations remain to be noticed. The first, and what I confess has caused me most difficulty, whether the question is open for your Lordships on this record, or whether the parties have not concluded themselves by their pleadings to the sole question whether, assuming the Scottish law to apply, there has been enough to set aside the contract on the ground of the lesion of the minor. Undoubtedly that does seem to have been the leading contention, and it is the ground upon which the judges have in the Court below determined this question.

Upon considering the first plea in law carefully in its several parts, I think it *is* intended to raise the question of whether minority alone apart from lesion does not invalidate the contract, and therefore I agree that the question is open upon this record; and I also agree that the Lord Ordinary's interlocutor and the annexed note shew that in his Lordship's opinion the contract made in Dublin and by a minor domiciled there would not deprive her of the right to sue for reduction if there were grounds for it, though it should be held that the minor was capable of entering into such a contract. It therefore becomes unnecessary to consider how far this appeal opens up every interlocutor for review if it should be found that one stood in the way of your Lordships giving judgment upon the appeal actually before the House.

The only remaining question is one which I certainly do not think one of difficult solution, though the statement of it appears to involve a somewhat anomalous state of things. Your Lordships sitting here require no evidence, indeed can receive no evidence, of English or Scottish law. If in the Scottish Courts evidence had been given of English law and no evidence adduced to contradict it, it would nevertheless be incumbent on your Lordships to decide according to your own views as to what the law of England is, even if it should be in absolute contradiction of all the evidence that had been received in the Scottish Courts; and it is manifest therefore that if all the facts are before your Lordships for decision, and that the point is open (and I have endeavoured to shew it is open to the parties to contend)—then, it is not only competent but incumbent upon this House to decide upon the true view of what legal rights these facts establish, although what was a question of fact in the Court of Session was not there mooted but is for the first time argued here before your Lordships.

This may affect the costs; and I think ought to affect the costs to the extent that I think the successful appellant ought not to get the costs of an appeal which was brought and successfully argued upon a point not pressed upon the Court below either by argument or evidence, but cannot, in my judgment, affect the right of the parties in the judgment which your Lordships ought to pronounce.

I designedly abstain from expressing my opinion upon the divergent views of the learned judges in the Courts below. All the judgments assume as their foundation the validity, subject to reduction upon the ground of enorm lesion of the contract in question; but in the view I have expressed as to that matter any opinion I might give upon the very difficult question as to what constitutes enorm lesion so as to justify the reduction of a minor's contract would be unnecessary and therefore improper in deciding this case.

I therefore move your Lordships that the interlocutor appealed from be reversed, but that the appellant should have no costs either here or below.

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LORD WATSON:—

My Lords, the appellant, Mrs. Cooper, was married in Dublin on the 15th of October, 1846, to the late Henry Ritchie Cooper, of Ballindalloch, who died on the 14th of June, 1882. At the time of the marriage the appellant, who was about eighteen years of age, and without legal guardians, was domiciled in Ireland. The domicil of the husband was in Scotland, and both the parties contemplated, in accordance with what proved to be the fact, that their married life would be spent in that country.

Upon the same day on which the marriage ceremony was performed the parties entered into a written contract, which bears to have been executed intuitu matrimonii. The only provision thereby made in the wife's favour is a personal obligation, prestable by the heir and executor of the husband, to make payment to the appellant, in the event of her surviving him, of an annuity of £80; and, in consideration of that provision the appellant discharges her legal rights of terce and jus relictæ, and all other claims competent to her upon his pre-decease, excepting such provisions as he might give her of his own free will. By his trust disposition and settlement, Mr. Cooper directed his trustees to pay to the appellant, out of the rents of his lands of Ballindalloch, and others, an annuity of £200, in lieu of all claims and provisions, whether legal or conventional.

This action was brought by the appellant, after her husband's death, for the purpose of reducing and setting aside the discharge contained in the marriage contract of the 15th of October, 1846, and of enforcing her legal rights.

The facts of the case, so far as I have already stated them, are matter of admission upon the record. The condescendence and pleas in law for the appellant, when fairly construed, disclose three separate grounds of reduction, all of which are disputed by the respondents. Taking the appellant's averments, not in the order in which they occur, but according to their logical sequence, it is alleged: first, that the contract sought to be reduced was executed by the spouses (or at all events by the appellant) after the marriage; secondly, that the appellant being an infant was, by the law of Ireland, "incapable of contracting to the effect of

discharging or renouncing the claims that would, according to the law of Scotland, be competent to her if she survived her husband"; and, thirdly, that assuming the contract to be ante-nuptial and valid, the discharge of her legal rights was to her enorm lesion.

The first and second of these grounds of action go to the very root of the case. If the marriage contract was, notwithstanding its tenor, post-nuptial, then the discharge is revocable by the appellant as a donatio inter virum et uxorem. If the capacity of the appellant to contract must be determined by Irish, or (what is the same thing) by English law, and she was, according to that law, incapable of binding herself, the discharge cannot stand in the way of her legal rights.

In my opinion, the appellant has failed to prove that the contract was executed after marriage. The only evidence bearing upon that part of her case is to be found in the testimony of the appellant herself, and of Mr. Horan, both of whom signed the deed under reduction, the one as a contracting party, and the other as a witness. Their recollection of other circumstances occurring at the time is not very distinct; and I do not think that their reminiscences as to the signing of the deed, however honest, can be held, after the lapse of eight and thirty years, sufficient to displace a material fact appearing from the tenor of a probative deed, which they attested by their subscriptions. Had it been proved that, in point of fact, the parties adhibited their signatures immediately after the ceremony was concluded I should still have been of opinion that the deed was not thereby deprived of its ante-nuptial character.

The respondents argued that the second ground of reduction is excluded from this appeal, and that your Lordships have not jurisdiction to determine either the applicability of English law or its effect as regards the appellant's capacity to contract. In the course of the argument it was suggested that the appellant's case, so far as it is based on the law of England, was disposed of by an interlocutor of the Lord Ordinary, dated the 31st of May, 1884, which simply repels the third plea in law for the respondents. That interlocutor has been appealed from, although it was not submitted to the review of the Inner House. Taken by itself, it does no more than affirm, in general terms, the rele-

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vancy of the appellant's action as laid; but the annexed note shews that the Lord Ordinary merely intended to decide, on the assumption of the Irish contract being valid, that the appellant was nevertheless entitled to sue for the remedy of reduction, on the head of minority and lesion, according to the law of Scotland, her matrimonial domicil. That being so, the interlocutor contains no adjudication either upon the applicability, or the effect, of the law of Ireland, as pleaded upon the record.

It is admitted that the appellant did not ask the judgment either of the Lord Ordinary or of the Inner House upon the merits of her objection to the contract founded upon English law. But, according to the ruling of the Lord Chancellor (Brougham) in *Luke* v. *Magistrates of Edinburgh* (1), that circumstance, of itself, does not necessarily prevent your Lordships from considering the objection now, if it be sufficiently raised on the record. The peculiarity of the present case, upon which the respondents strongly relied, consists in this, that in the Courts of Scotland English law is treated as matter of fact, and must be proved as well as averred, in order to enable the judges to give a decision upon it. The appellant adduced no evidence as to the law of England, and was therefore not in a position to press her objection before the Court of Session. On the other hand, this House, as the commune forum of the three countries, deals with such an objection as matter not of fact, but of law, and gives its decision upon the legal issues raised, without regard to evidence led in the Court below.

I am of opinion with your Lordships that the objection may be competently disposed of by the House. If the question had been one of fact, we could not, in the absence of proof, have entertained it. I think, however, that as the case stands, the appellant is not in a worse position than she would have occupied if she had brought forward evidence of English law, and had then failed to submit it to the judgment of the Courts below. That course was actually followed by the pursuer and appellant in the case of *Longworth* v. *Yelverton* (2), who not only pleaded that she was married to the defender, according to one or other of three modes permitted by the law of Scotland, but averred

(1) 6 W. & S. 241. (2) 4 Macq. 745.

and brought legal evidence to prove the constitution of a fourth marriage in Ireland, according to the law of that country. The weight of the evidence being against her, she refrained from pleading upon it before the Scotch Courts; and in her appeal against their final judgment, which was unfavourable to her, she pressed the Irish marriage in argument for the first time. The Lord Chancellor (Westbury) observed (1): "The respondent also affirms on the record that a religious ceremony took place between the parties in Ireland, which amounted to a marriage if there was none before; but she was content in the Court below to have it assumed that this ceremony did not per se constitute a valid marriage, and having so submitted, it is not competent to her to maintain a different view of the case before this House as a Court of Appeal." The language of the noble Lord very concisely states the substance of the respondents' argument in this appeal. But the other noble Lords present did not adopt the view of the Lord Chancellor; and Lords Wensleydale, Chelmsford, and Kingsdown entertained the question of the alleged Irish marriage, and gave judgment on its merits, against the appellant. I need scarcely add that, so far as concerns the matter of competency, it is immaterial on which side judgment was given.

Whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicil, or by the lex loci contractus, has been a fertile subject of controversy. In the present case it is unnecessary to decide the point, because Ireland was the country of the appellant's domicil, and also the place where the contract was made. It was argued, however, for the respondents, that the appellant's objection to the contract, although it rests upon her alleged incapacity to give consent, must be decided by the law of Scotland, as the lex loci solutionis. I am by no means satisfied that Scotland was, in the proper sense of the phrase, the place of performance of the contract. The spouses no doubt intended to reside in Scotland, but they must also have intended that the contract should remain in force and be performed in any other country where they might, from choice or necessity, take up their abode.

(1) 4 Macq. at p. 832.

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Apart from that consideration, and assuming Scotland to have been, in the strictest sense of the term, the locus solutionis, I think the argument of the respondents is untenable. The principle of international private law, which makes, in certain cases, the law of the place where it is to be performed the legal test of the validity of a contract, rests, in the first place, upon the assumption that the parties were, at the time when they contracted, both capable of giving an effectual consent; and, in the second place, upon an inference derived from the terms of the document, or from the circumstances of the case, that they mutually agreed to be bound by the lex loci solutionis in all questions touching its validity. That principle can, in my opinion, have no application to a case in which, at the time when they professed to contract, one of the parties was, according to the law of that party's domicil and also of the place of contracting, incapable of giving consent.

Being of opinion that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of England, I agree with your Lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scotch widow. The rule seems to be clear that an infant cannot, during minority, effectually subject herself to any contractual obligation which cannot be shewn to have been for her benefit. She may ratify the contract, after attaining majority, and so become liable to implement it, but, in the circumstances of the present case, any such ratification of the contract would, according to the law of Scotland, have been revocable by her as a donation inter virum et uxorem. The respondents argued, from the supposed analogy of the case of settlements in bar of dower, that the provisions made by her husband in the appellant's favour by the marriage contract, and by his trust disposition, ought to have the effect, according to English law, of excluding her legal claims. In reality no such analogy exists. The rule which enables a husband by his own act to exclude the peculiar right of dower rests upon statute, although the Court of Chancery has, from equitable considerations, enlarged the scope of its enactments, so far as regards the character of the provisions which are to be deemed as in satisfaction of the widow's

right. But these enactments, as well as the decisions of the Court, leave untouched the personal incapacity of the minor; and cannot, in my opinion, be extended to terce and jus relictæ, which are rights essentially differing from that of dower.

These considerations are sufficient for the disposal of the whole merits of this appeal. It is therefore unnecessary to determine whether the marriage contract is reducible on the head of minority and lesion, which was the only question argued and decided in the Court of Session. All I shall say upon that point is, that had it been necessary to decide it, I should, as at present advised, have hesitated to disturb the judgments of the Courts below. I think the appellant is greatly to blame for having kept back her leading ground of reduction until she appeared at your Lordships' bar, and that she ought not to have the costs incurred by her either in the Court of Session or in this appeal.

I accordingly concur in the judgment which has been moved by the Lord Chancellor.

LORD MACNAGHTEN :—

My Lords, in this case Mrs. Cooper, the widow of a domiciled Scotchman, but an Irishwoman by birth, challenges on various grounds the validity of a settlement made on the occasion of her marriage, by which she purported to discharge her legal rights—her terce and her jus relictæ. It seems to me to be satisfactorily proved by the evidence that the settlement was executed before the ceremony of marriage took place. I mention this because, notwithstanding the opinion of two of the learned judges and the opinion just expressed by my noble and learned friend opposite (Lord Watson), I should venture to doubt whether a contract executed after the status of the contracting party had been definitely altered by marriage could be regarded as an ante-nuptial contract. Be that as it may, it is not disputed that at the time of the execution of the contract the lady was an infant; and it is averred by the defenders and admitted by the pursuer that "the pursuer was at the date of the marriage a domiciled Irishwoman."

As regards the contracts of infants the law of Ireland, which does not differ from that of England, is well settled. Infants are

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incapable, speaking generally, of binding themselves absolutely by contract. A settlement on marriage not being a settlement under the Infants Settlement Act (18 & 19 Vict. c. 43) forms no exception to the rule. Primâ facie, therefore, Mrs. Cooper was not bound by the settlement in question. Primâ facie it was voidable by her. And she has elected to avoid it. It is not alleged that she has done any act to confirm it if not binding upon her at the time of its execution.

This was the main ground of appeal before this House.

Three answers were suggested on behalf of the respondents. In the first place it was said that this was a Scotch marriage contract, that the domicil of the intended husband was Scotch, and that Scotland was the place where the contract was to be fulfilled, that is, where the parties intended to reside after marriage. All that is very true. But it is difficult to see how it can affect the question.

It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicil. It may be that all cases are not to be governed by one and the same rule. But when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicil.

In the next place it was argued, though somewhat faintly, that the contract ought to be held binding on Mrs. Cooper by analogy to those cases where before the Dower Act a provision, not amounting to a bar to dower under the statute of Henry VIII., was yet held to be a bar in equity. This is certainly a very refined argument. Moreover, the foundation for it seems to be wanting. Undoubtedly, even in the case of an infant a reason-

able provision by ante-nuptial contract was held to be an equitable bar to dower. But no decision was cited to your Lordships, nor am I aware of any, in which the doctrine was recognised where the father or guardian of the infant did not concur in the contract. "A female infant," says Sir John Leach in *Simson* v. *Jones* (1), "is bound by the settlement made on her marriage as to dower and thirds, not by force of her agreement in the settlement, but by reason of the consent of her parents and guardians and of the statute of Henry VIII." Here the father of the infant was dead, and it is admitted that she had no legal guardian.

The third answer on the part of the respondents seems at first sight more formidable. It was said that the point was not argued before the Lord Ordinary or in the Court of Session, and that the appellant has deliberately excluded the consideration of Irish law. It is true that in the Courts below there was no evidence of what the law of Ireland was—and those Courts therefore were unable to consider the question. But there is enough upon the pleadings to raise the point; and the peculiarity of the case is that what must necessarily have been a question of fact in the Courts below becomes a question of law in your Lordships' House. It is not competent to your Lordships on an Irish question, though involved in a Scotch appeal, to shut your eyes to the law of Ireland, and to determine the rights of the parties in the dark, as the Courts below were compelled to do. The authorities cited by the learned counsel for the appellant seem to shew conclusively that in a case like the present your Lordships cannot divest yourselves of your judicial knowledge of Irish law.

The interlocutor of the 31st of May, 1884, whether it be now appealable or not, does not, I think, present any difficulty. The interlocutor itself does not touch the question. There are expressions in the opinion of the Lord Ordinary which, taken apart from the context, seem to be unfavourable to the view now presented by the appellant. But the opinion was directed to a wholly different point. Proceeding on an erroneous assumption of what the law of Ireland was, the defenders pleaded that the

(1) 2 R. & My. 377.

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law of Ireland was a bar to the pursuer's remedy in a Scotch Court. And to that the opinion of the Lord Ordinary was addressed.

Upon these grounds, without expressing any opinion on the reasons upon which the decisions of the Lord Ordinary and the Court of Session are founded, I concur in the conclusion that the appeal ought to be allowed; and I agree as to costs.

Ordered and adjudged,—That the interlocutor of the Lord Ordinary of the 31st of July, 1884, and also the interlocutor of the Lords of Session of the Second Division of the 9th of January, 1885, and also the interlocutor of the Lord Ordinary of the 31st of January, 1885, so far as the said interlocutors are appealed from, be reversed. And it is declared that the appellant is not barred, by the marriage contract sought to be reduced, from now electing to take her legal rights as the widow of the deceased Henry Ritchie Cooper; and it is further ordered, subject to the foregoing declaration, that the cause be remitted back to the Second Division to proceed therein as may be just, neither party being found entitled to the costs hitherto incurred by them in the Court of Session: and it is further ordered that there be no costs to either party in this House. And it is further ordered that the respondents do pay to the appellant any expenses already paid to them by the appellant under the interlocutors now reversed.

Lords' Journals, February 24th, 1888.

Agent for appellant: *Andrew Beveridge, for Forbes, Bryson & Carrick, Solicitors, Glasgow*, and *H. B. & F. J. Dewar, W.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Webster, Will & Ritchie, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

LA BANQUE JACQUES-CARTIER . . . PLAINTIFF;

AND

LA BANQUE D'ÉPARGNE DE LA CITÉ ET DU DISTRICT DE MONTREAL . . } DEFENDANT;

J. C.*
1887
Nov. 3, 15.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

Ratification—Illegality of the Transaction—Absence of full Knowledge.

Acquiescence and ratification must be founded on a full knowledge of the facts, and further, it must be in relation to a transaction to which effect may be given thereby.

Where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for his own purposes:—

Held, overruling the Court below, that the doctrine of acquiescence and ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed.

APPEAL from a decree of the Court of Queen's Bench (Jan. 25, 1886) reversing a decree of the Superior Court for Lower Canada, District of Montreal (June 19, 1884) which was in favour of the appellant for the full amount claimed.

The appellants claimed by their declaration the sum of $43,988 45*c.*, together with interest and costs on an alleged balance of account of securities deposited by the appellants with the respondents to cover advances made from time to time.

The respondents pleaded a tender and payment into Court of the sum of $15,655 74*c.*, which was made up as follows:—the sum of $15,317 09*c.*, being the balance admitted by the respondents to be due by them to the appellants, the sum of $284 50*c.*, the amount of the interest thereon up to date, and the sum of $54 15*c.*, in respect of costs, averring that the total amount so paid into Court was sufficient to satisfy the appellants' claim. The respondents denied further liability on the ground that they were entitled to debit the appellants with the sum of $24,278 79*c.*, the amount claimed to be due on a loan of

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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$25,000, which the appellants, through their manager, Honoré Cotté, had procured from the respondents on the 13th of September, 1873.

The appellants replied that they had never authorized the said Honoré Cotté to contract such loan on behalf of appellants' bank, that such loan had been in fact made to Honoré Cotté personally, and that the appellants were not liable for the same.

The Court of first instance decided that the appellants were not liable in respect of such loan, the Court of Appeal held that they were.

The facts of the case are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *Fullarton*, for the appellants, contended that, on the evidence, the loan made by the respondents was made to Cotté personally, and not to the appellants. As regards the alleged ratification by the appellants of Cotté's contract, the contract did not purport to have been made for the appellant bank or by its authority, nor for its benefit. Cotté had no authority to contract for the bank. There was, therefore, nothing to ratify. The bank repudiated the transaction at the first opportunity. Reference was made to *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (1).

Anderson, Q.C., and *Normandy*, for the respondents, contended that on the evidence the loan was procured for the appellant bank and for its benefit by Cotté; that Cotté had authority to effect it; and that the appellants ratified it. Reference was made to *Commercial Bank of Scotland* v. *Rhind* (2); *Cave* v. *Mills* (3).

Counsel for the appellants were not called on to reply.

1887 *Nov.* 4.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

The appeal now before the Committee, in which La Banque Jacques-Cartier is plaintiff and appellant, and La Banque

(1) 29 Ch. D. 902, 911. (2) 3 Macqueen, 643.
(3) 7 H. & N. 913; 31 L. J. (Ex.) 265.

d'Epargne is defendant, appears to their Lordships to involve no question of importance or difficulty, or in its result to affect any interest save those of the litigants in respect of the sum of $25,000, the subject of the loan of the 13th of September, 1873.

The parties have now no controversy, save as to the liabilities of the one party, or the rights of the other arising out of that one transaction, and its attendant or following circumstances. They have wisely, by consent, limited the inquiry, and thus relieved the Courts below and their Lordships from complications and apparent difficulties. The case is one depending mainly on matters of fact, and their Lordships do not think it to be necessary to take any further time for consideration.

The plaintiffs represent a bank incorporated by a Canadian statute and governed by the rules which the statute enacts or incorporates, and amongst others, by sect. 40, which in negative words prohibits the banking company from trafficking in its own shares. The words of the 40th section are these: "The bank shall not either directly or indirectly lend money or make advances upon the security, mortgage, or hypothecation of any lands or tenements, or of any ships or other vessels, nor upon the security or pledge of any share or shares of the capital stock of the bank." It then defines what they may deal with, and in a subsequent section, which it is not necessary to refer to more particularly, gives them authority to lend money on the shares of other banks, but not their own.

The defendant bank, as its name indicates, is a savings bank incorporated under another Canadian statute to which it is not necessary now to refer. The two banks seem to have had large and legitimate transactions prior to the 13th of September, 1873, and also subsequent to that date down to the 15th of June, 1875, when the appellants stopped payment, and closed their doors. The general course of dealing was that the savings bank from time to time deposited large sums in the plaintiffs' bank, to be held by the latter at call, or for short stated periods at interest, but without security. This practice and course of dealing continued to the end of 1874, when there being $500,000 due to the defendants' bank by the plaintiffs' bank, and the latter requiring further aid to meet pressing engagements, their cashier Cotté

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agreed with the defendants on the 16th of February, 1875, for a further advance of $143,000 with collateral security. It is unnecessary to pursue this further, as the plaintiffs received the amount of these loans, and they have been repaid to the defendants. They are referred to only as reflecting some light on the transaction of the 13th of September, 1873, to which their Lordships now return.

The obligations and rights of the parties must now depend on the facts as established, and as to the material facts it seems to their Lordships that there is no real controversy.

The facts are very clearly stated in the judgment of Judge Mathieu, and the results are ascertained by his seven absolute findings which their Lordships adopt for the purposes of their judgment. They generally concur in those propositions, but especially in the fifth, which is to the effect that Cotté had no authority to pledge the plaintiffs' securities to the defendants for his personal debt. There is no real difference as to the material facts between Judge Ramsay in the Court of Appeal (Queen's Bench), and Judge Mathieu, but there is one statement of Judge Ramsay which their Lordships cannot adopt. Judge Ramsay, referring to the transaction of the 13th of September, is represented to have said "that the cashier Cotté had actually borrowed for his bank, if not in an identical manner, at all events in a somewhat similar manner, nearly $500,000." That statement seems to their Lordships not to be sustained by the evidence and to be, in fact, contrary to it.

Their Lordships now return to the transaction of the 13th of September, 1873, and pay special attention to the written records which disclose its true character. Their Lordships desire to observe in passing that where, in reference to transactions of this character, there is a conflict of verbal testimony, they would generally give weight to the written records which exist, and which rarely err.

The contemporaneous written evidences all reach the same point. The loan made on the 13th of September, 1873, was beyond all doubt or question a loan to Cotté personally, and on his personal security, with a collateral pledge of the 500 shares in the Banque Jacques-Cartier. The form of the loan, the promissory

note of Cotté that accompanied it, the collateral security and the payment of the amount to Cotté, on cheques payable to him personally, and the entries then made in the books of the defendants, all tend to the same point.

It was urged that Cotté took up this money for the Banque Jacques-Cartier, which got the benefit of it, but this allegation is manifestly unfounded. Cotté had not, and does not pretend that he had, any authority to negotiate this loan on behalf of the plaintiffs, and the proceeds were received by Cotté and immediately applied to liquidate his own debt to his own bank.

Then again it was alleged that the 500 shares deposited by Cotté with the defendants, and actually transferred by him to them as part of the transaction, were the property of the plaintiffs, though standing in the name of Cotté. There is no reliable proof of this allegation, which could have been established beyond any manner of doubt if it was true, and it seems to their Lordships that the evidence is entirely the other way. Their Lordships, therefore, are obliged to assume that in law the plaintiffs could not be, and in fact were not, the owners of these 500 shares. Their Lordships desire to point out that if the loan of the 13th of September was a loan made to the plaintiff bank, and on its credit, there seems to be no reason why the prior practice should have been departed from, or why security should have been required. The Banque Jacques-Cartier then owed nothing to the defendants, and the defendants subsequently deposited with the plaintiffs sums amounting to over $500,000 without any security.

The loan of the 13th of September became repayable on the 13th of December, 1873, but was not repaid by Cotté, and on that day a further agreement was entered into between him and the defendants, which is set out in the record and speaks volumes by itself. It is observable, without reading it, that Cotté is here described as "Esquire of Montreal," and it is signed by him as "H. C. Cotté," not as cashier or manager, but "H. C. Cotté" simply—but it is signed, on the other hand, by E. J. Barbeau, who describes himself as the manager for the defendants.

No alteration is made in the books of the defendants to indi-

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cate that the plaintiffs are in any way connected with this extension of the loan, and the documentary proof is consistent with an extended credit to Cotté personally and to him alone.

From September, 1873, to June, 1875, when the plaintiffs' bank shut its doors, there is not to be found a shred of documentary proof that the plaintiffs' bank were in any way interested in or liable for this loan of $25,000, or that Cotté had any authority whatsoever to bind the plaintiffs' bank in respect of it, and it seems to their Lordships that under such circumstances it is unnecessary to investigate whether the statement alleged to have been made by Cotté to Judah on the 13th of September, 1873, or to Barbeau on the 13th of December, 1873, were so made as represented, for if made they could be of no avail.

It seems not improbable that some such statement may have been made on the 13th of December, and that Judah has confounded one date with the other. There is nothing in what their Lordships say that is meant as an impeachment of Judah, but their Lordships think he made a mistake.

The bank stopped payment in June, 1875, and up to that event there is nothing in the case to indicate that the defendants alleged that the loan of the 13th of September, 1873, or its extension was a loan to the plaintiffs, or on their credit, or that they knew in fact of its existence. The defendants and Cotté had knowledge of the transaction, but the Banque Jacques-Cartier seems to have been in entire darkness as to it. Barbeau in his evidence, alluding to the statement of Cotté, alleged to have been made on the 13th of December, makes use of this expression, that it never entered into their minds to consider the liability of the Banque Jacques-Cartier in respect of it.

The Banque Jacques-Cartier having shut its doors, and Barbeau, the manager of the defendant bank, as its principal creditor, having been somehow appointed as administrator of its affairs, then commences under his management and direction what has been called a manipulation of the books of both establishments, which their Lordships do not find it necessary to examine in detail or to assign to it its proper name and character.

If it had not been for these subsequent details, and if the case stood as it was when the Banque Jacques-Cartier shut its doors,

it seems plain that the judgment of the Appellate Court in Canada would have been in accordance with the decision of the primary Court.

Their Lordships do not find it necessary to refer at length to the transaction of February, 1875. Judge Ramsay in his judgment, after dealing with the case up to the point which their Lordships have now reached, and dealing with the acts of Barbeau, says: "I think that no unauthorized act of Mr. Barbeau could alter the relations of the two banks while he represented both. I think, therefore, that while Mr. Barbeau was managing the Jacques-Cartier bank, nothing has been proved to have taken place which could alter the original condition of the transaction, which, on its face, was a loan to Mr. Cotté personally." In those observations of Judge Ramsay their Lordships concur. Then he goes on: "But the appellant has another line of defence which presents a question of greater delicacy, upon which the judgment of this Court definitely turns. The account was transferred in the books of the Jacques-Cartier bank on the 23rd of June, 1875, at latest on the 29th of July it was altered in the pass-book. In September, 1875, Mr. Barbeau ceased to have any authority in the Banque Jacques-Cartier. Its affairs were, in December, transferred to a new, and it must be presumed, a vigorous administration, yet it was not till the 5th of August following that they repudiated the debt entered in their books on the 23rd of June of the previous year. Admitting to the fullest extent that Mr. Barbeau's position in the Banque Jacques-Cartier, so long as he remained there, was a disturbing element in estimating the presumption of acquiescence in a transaction entirely in favour of the Banque d'Épargne, how can we account for the silence of the administration during more than nine months?" Accordingly the learned judge proceeds to determine the case against the present appellants on the ground of acquiescence as their Lordships understand his judgment, and upon that and that alone, that is to say, that by their silence for so lengthened a period the directors of the Banque Jacques-Cartier had acquiesced in the change of the accounts, and in that very dubious and singular entry in the pass-book without any explanation.

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The old and debilitated, and what might be called the paralysed and negligent board that existed at the time that this bank stopped payment, is put aside, and a new and vigorous directorate is appointed, and an investigation ensues, and the real character of the transactions is ascertained, that the loan of September, 1873, was a loan to Cotté on his personal security for his own purposes, and not for the benefit of the bank, save to this extent, that it enabled him to pay off or diminish his debt to the Banque Jacques-Cartier. Judge Ramsay puts it upon the doctrine of acquiescence or ratification, though it is difficult to say where acquiescence becomes ratification, but he fixes the period of acquiescence from the election of the new board to the time of the resolution and protest. The new board seems to have done its duty, as it appears to their Lordships, with activity. There was a great deal of complication, and a great deal to be investigated. There were accounts running over a long period, so complicated by the entries of Barbeau, that the parties think it necessary to load the record with nearly 300 pages of accounts. Acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction. But this is not the character of the present case. Their Lordships are dealing with the assets of a company which it is to be borne in mind had stopped payment, and everything done in the nature of acquiescence or relied upon as such is something that occurred after that bank had stopped payment, and during the time when a struggle was being made by the new directorate to realise the assets of the bank for the payment of its real creditors and the protection of its shareholders. It is said that under such circumstances as these there can be acquiescence. But in what? Acquiescence in the appropriation of the money of the shareholders to pay the debt due by Cotté to the savings bank.

Their Lordships are inclined to adopt entirely the argument that such an acquiescence, even if it had been proved, would be ultrà vires of those representing the bank after its stoppage, when their duty and their business was to protect the shareholders, to

pay the creditors, and to collect the assets of the bank for that purpose, and not for the purpose of paying the debt of Cotté, who was already a defaulter to the amount of $50,000.

Mr. Normandy, in his argument, at considerable length, rested upon the transactions of February, 1875. Statements were no doubt then made, but whether they were made to Judah or to Barbeau, or to others connected with the bank, does not appear to their Lordships to matter very much; but it is alleged that there was Cotté's statement that this was a transaction with the bank entered into for their benefit, and to raise money for their necessities. If such statements were made, their Lordships have no proof of the existence of those facts, and above all they have not the slightest proof of the authority of Cotté to take up this money for the bank, and clearly he had no authority whatever to pledge the securities of the bank for the debt that he himself owed.

Entertaining these views their Lordships do not think it necessary to go further into the details of the case. The real keystone of the whole is the original transaction. Once its true character is ascertained, it appears to their Lordships that everything else follows. Their Lordships are therefore of opinion that Judge Mathieu took the true view of the case, and they are prepared to adopt his conclusions; and they will therefore humbly advise Her Majesty to reverse the decision of the Court of Queen's Bench for Lower Canada, and to reinstate the judgment of the Superior Court with costs.

Their Lordships think that the appellants should have the costs of this appeal; but on the taxation of the costs here they desire that their officer should have regard to the fact that the record has been cumbered with over 200 pages of accounts of no use whatever on the appeal, and but one or two items of which have been read. If this most unnecessary expense was occasioned by the default of the appellants, they ought not to have the costs thus occasioned.

Solicitors for appellant: *Simpson, Hammond, & Co.*
Solicitors for respondents: *T. & C. Robinson & Wilkes.*

[PRIVY COUNCIL.]

J. C.* JOHN PORTEOUS AND OTHERS . . . . PLAINTIFFS;

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Nov. 10, 11, 15. JOSEPH REYNAR . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Law of Canada—C. C. P. Art. 19—*Right of Suit by Trustees as distinguished from Mandatories.*

Article 19 C. C. P., is applicable to mere agents or mandatories. It is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate.

Where trustees sold property over which they had possession and title; *held*, that they were entitled to sue the purchaser to whom they had delivered possession, upon his covenant to pay the balance of the purchase-money.

Browne v. *Pinsoneault* (3 Sup. Ct. Can. Rep. 102) and *Burland* v. *Moffatt* (11 Sup. Ct. Can. Rep. 76) overruled.

APPEAL from a decree of the Court of Queen's Bench (Oct. 8, 1885) reversing a decree of the Supreme Court of the Province of Quebec, District of Three Rivers (Nov. 8, 1884).

The action was brought by the appellants against the respondent on the 19th May, 1884, to recover $4281, being the price of certain land sold by the appellants to the respondent under an act of sale in December, 1882.

The defence of the respondent, while not disputing the right of the appellants to sell the lands in question, or the respondent's liability to pay for them, denied the right of the appellants to bring an action for the recovery of the sum in question in their own names.

The facts of the case are stated in the judgment of their Lordships.

The judgment appealed from was given in deference to two decisions of the Supreme Court of Canada in *Browne* v. *Pin-*

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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soneault (1) and *Burland* v. *Moffatt* (2), and held "that a voluntary assignment by an insolvent debtor of his estate and property for the benefit of his creditors, did not confer on the assignees the right to sue or defend in their own name the actions accruing with regard to the estates and property assigned, and that the present case did not constitute an exception to the ruling of the Supreme Court."

Bompas, Q.C. (*Jeune*, with him), for the appellants, contended that these decisions, in so far as they were applicable, departed from well recognised principles of the law of Quebec and were erroneous. The whole case of the respondent rested on the contention that the appellants were mere agents of the creditors, and as such were not entitled to sue for the price of the land sold to him in their own names. Previous to *Browne* v. *Pinsoneault* (1) it was accepted law in the Courts of Quebec that a person having such saisine of real property as entitles him to sell it and to give a valid receipt for the price is entitled to bring an action for the price in his own name. See *Nault* v. *Charby* (3). *Browne* v. *Pinsoneault* (1) rested on the supposed effect of C. C. P. art. 19. It was contended that this article had no application. The decision in that case upon this point was not necessary to support the judgment, while *Burland* v. *Moffatt* (2) had no application to this case. The appellants were cessionaires of the property and not agents of the creditors. As assignees of the creditors they were entitled to sue in their own names. Reference was also made to *Chevalt* v. *De Chantal* (4).

[THEIR LORDSHIPS intimated that it was unnecessary to hear Mr. *Jeune*.]

The respondent did not appear.

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The judgment of their Lordships was delivered by

LORD FITZGERALD:—

This appeal comes before their Lordships ex parte. The plaintiffs below are the appellants, and are represented here by

(1) 3 Sup. Ct. Can. Rep. 102.
(2) 11 Sup. Ct. Can. Rep. 76.
(3) 18 Low. Can. Jurist, 19.
(4) 8 Low. Can. Rep. 85.

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solicitor and counsel. The defendant, who obtained the decision of the Supreme Court of Canada in his favour, does not appear.

In this particular case, which is one of considerable importance, though it does not present much difficulty, it was specially desirable that the respondent should have been represented by counsel to assist their Lordships by his arguments, and to lay before them the reasons for the decision of the Supreme Court. Mr. Bompas, Q.C., for the appellants, has fully and candidly opened the case on both sides, and has laid before their Lordships the authorities on which the Supreme Court acted. But though that is so, it is incumbent on their Lordships, in a case heard ex parte, to examine it more minutely, and to give their reasons more at large than would otherwise be necessary or desirable. Two leading authorities, decisions of the same Supreme Court, on appeal, have been principally discussed, viz., *Browne* v. *Pinsoneault* (1) and *Burland* v. *Moffatt* (2), and as there was no appeal in either of those cases to this tribunal, the decisions are binding and conclusive in Canada. But nevertheless it became obvious, in the course of this hearing, that it would be necessary for their Lordships to review these previous decisions as to one question affecting this appeal. The facts of the present case are conveniently and accurately stated in the appellants' case. The action was brought by the appellants against the respondent on the 19th of May, 1884, to recover $4281, being the price of certain land sold by the appellants to the respondent under an act of sale in December, 1882. The notarial act was made between the appellants and respondent, and the respondent's contract to pay the price was with the appellants in their own names. The defence of the respondent, while not disputing the title of the appellants to the lands in question, or their right to sell, or the respondent's liability to pay for them, denied the right of the appellants to bring an action for the recovery of the price in their own names. In 1876, the firm of Benson, Bennett, & Co., in which Alfred Frederick Augustus Knight was a partner, became insolvent, and made an assignment under the Insolvent Act of 1875 to William Walker, as official assignee, for the benefit of their creditors. By a deed of composition and discharge,

(1) 3 Sup. Ct. Rep. 103. (2) 11 Sup. Ct. Rep. 76.

made under the provisions of the same Act on the 16th of June, 1876, and a deed supplementary thereto made on the 19th of June, 1877, Knight undertook to pay a composition to the creditors of Benson, Bennett, & Co., on condition that all the assets of the firm were transferred to him, with the exception of the real property and the timber limits, which were to be transferred by the official assignee, in whose possession they were by law, to the appellants, Ross and Porteous, and one Francis Vezina (since deceased) as trustees appointed by all the parties concerned, to hold the said real estate and timber limits for the benefit of the creditors and of Knight, until Knight had paid all the instalments of the composition, when the real estate and the timber limits would be conveyed to him by the said trustees. Knight was unable to pay the composition, and thereupon, on the 24th of January, 1879, by an agreement made by the creditors of the firm of Benson, Bennett, & Co., and Knight, it was agreed that Knight should transfer all the assets of Benson, Bennett, & Co. in his hands, and all his interest in the real property of the firm to the appellants, Porteous and Ross, and the said Vezina, for the creditors. By a deed made on the 9th of June, 1880, the official assignee transferred to the appellants, Porteous and Ross, and the said Vezina, the said real property and timber limits, and all his rights therein, Knight consenting and releasing all his rights. On the 16th of May, 1882, by a deed between the creditors of Benson, Bennett, & Co., and the appellants, Porteous and Ross and Pierre Lafrance, after reciting that Vezina died on the 25th of January, 1882, and it was desirable that a formal deed should be executed to carry out the provisions of the agreement of the 24th of January, 1879, it was provided that the appellant, Pierre Lafrance, should be appointed in the place of Vezina; and that after the execution of the deed the appellants should have actual and exclusive possession of all the real and personal property of Benson, Bennett, & Co., with power (art. 18) to sell the same or any part thereof, and (art. 19) to prosecute any actions necessary in the interest of the estate. All proceeds (art. 22) of the estate, after payment of the trustees' expenses, to be divided amongst the creditors. It was stated (art. 26) that the powers and authority given to the trustees were

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given with the intent that the trustees should have the power of granting as good and valid a conveyance of any part of the estate as if every creditor signed the deeds. In accordance with the provisions of the deed of the 16th of May, 1882, the appellants took possession of the real property of the firm of Benson, Bennett, & Co., and in December, 1882, by the act of sale, sold part thereof to the respondent. The title of the appellants, and their right to sell the property, as arising under the conveyance of William Walker, the official assignee, and dated the 9th of June, 1880, and the deed of the 16th of May, 1882, was stated on the face of the act of sale. The respondent took possession of the land so sold to him, and cut down timber thereon. The whole case of the respondent rests on the contention that the appellants were agents of the creditors, and as such were not entitled to bring an action for the price of the land sold to him in their own names. It was not contested but that by the insolvency of Benson & Co., and by force of the provisions of the Insolvency Acts, their whole estate vested in the official assignee, and that if the sale to the defendant had been by the official assignee, that officer, and he alone, could have sued in his own name as such to enforce payment of the purchase-money. Their Lordships refer to sects. 16, 39, 75, 76 of the Canada Insolvent Statute. The three original trustees had been appointed by the creditors' inspectors with the powers and duties expressed by sect. 49 of the same statute. The several deeds or agreements by which the trustees became trustees of the estates were all duly made under the insolvency and in accordance with the provisions of the Insolvent Statutes, and by the deed of the 9th of June, 1880, to which the official assignee was a party, and made also in pursuance of the same statutes, the said official assignee did, "for the advantage of the creditors and of the estate," transfer and assign to the trustees all the whole real estate of the insolvents to hold for the purposes of the deed, and it contains the following provision: "And for the effect of the present assignment the said William Walker, official assignee, did hereby put, substitute, and subrogate the said John Porteous, James Gibb Ross, and François Vezina, in their capacities of trustees and inspectors as aforesaid, in the place and stead of him, the said William Walker, in his capacity

aforesaid, and in all his rights, title, interest, and demand, privileges and hypothecs, in, to, upon, or respecting the premises. and the above named Alfred Frederick Augustus Knight doth, both individually and as having been such co-partner, ratify and confirm the same in all respects, and doth consent and agree that the said parties of the second part shall receive and dispose of all the real estate herein above mentioned for the purposes hereinbefore set forth, hereby relinquishing, in favour of the said parties of the second part, all and any rights of any kind that he the said Alfred Frederick Augustus Knight may or can have in, to, or upon the above-mentioned real estate and premises."

By the deed of the 16th of May, 1882, to which the creditors were parties, and by which Lafrance was appointed trustee in place of Vezina deceased, after reciting that the whole property had come into the possession of the trustees, the confirmation of prior deeds and an agreement to discharge Knight from his liabilities under the composition arrangement, by the 18th article of the deed, it is declared "that the trustees shall have actual and exclusive possession of the whole of the said estate, real and personal, and are authorized to sell and dispose of it in such wise and upon such terms and conditions, either by private sale or by auction, and either for ready money or on credit, as to them, in their own discretion, shall appear most advantageous to the said creditors, with power to the said trustees in their discretion to contract from time to time any loans that they, in their discretion, may deem necessary for the advantageous carrying out of the trusts hereby reposed in them, as well as for the better conservation of the property hereby entrusted to them, and also for the execution of any incumbrances thereon; also to lease the said real estate or any part thereof until it can advantageously be sold; and also until the said timber limits can be sold, to allow timber to be cut thereon upon such terms as the said trustees may deem reasonable." And by 19th, "That the said trustees shall and may, by all such lawful ways and means as they may think proper, collect and get in all sums of money belonging to the said estate; and dispose of, and convert into money all other the property and effects belonging to the said estate, the whole as to them in their discretion shall seem best; also to commence

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and prosecute any action or actions, suit or suits, as well real as personal, in any courts of law or equity for the recovery of any sums or sums of money, goods, chattels, or other property of any kind that now is or may hereafter become due or payable or belonging to the said estate or for any other purpose that the said trustees may consider necessary in the interest of the said estate to commence and prosecute, and the same action or actions, suit or suits, to prosecute and follow until final judgment." And by 22nd, "That all moneys which shall be got in and received by the said trustees after the payment of all costs and charges of winding-up the said estate, shall be applied in the first place to the payment of the advances heretofore obtained by the said trustees to enable them to meet the expenses incident to the discharge of their duties as such trustees, and more particularly to pay the sum of $6170 and 15 cents (with interest at 7 per cent.) advanced by the bank of Montreal to pay the Crown Lands Department the transfer dues owing on said timber limits so belonging to the said estate, as appears by a certain deed bearing date the 30th day of June, 1887, executed before the undersigned notary, to which William Walker, of the said city of Quebec, in his capacity as assignee as aforesaid, was party of the first part, and the said Bank of Montreal was party of the second part, and the said Alfred Frederick Augustus Knight was party of the third part, and by a certain deed bearing date at Quebec aforesaid, on the 4th of July of the same year, passed before the same notary between the said parties." The estates being thus vested in the trustees they proceeded to sell and make sale of a portion to the defendant, and by the conveyance dated the 13th of December, 1882, in which their position as vendors, and their title to the lands is fully recited, they conveyed to the defendant, "for ever, with promise of warranty against all gifts, dowers, mortgages, substitutions, alienations, and other hindrances whatsoever, the lands so sold; of all of which the said purchaser declares to have a perfect knowledge, as having viewed and examined the said property and the titles thereto, and therewith is content and satisfied. Which said vendors are lawfully seised thereof under and by virtue of a certain deed of transfer consented to by the said William Walker of the said city of Quebec

Esquire, official assignee, in his capacity as assignee duly appointed to the insolvent estate of Benson, Bennett, & Co." The deed then recites, "The present bargain and sale is thus made for and in consideration of the price or sum of $11,014 and 64 cents, on account of which the said vendors do hereby acknowledge to have received from the said purchaser, at the time of the execution thereof, the sum of $3671 and 54 cents, dont quittance d'autant. And as to the balance of the said purchase price, to wit, the sum $7343 and 10 cents, the said purchaser doth hereby bind and oblige himself, his heirs and assigns, to pay the same to the said vendors at the said city of Quebec," by instalments as provided for in the deed. The action was instituted by the trustees' vendors to recover the residue of the purchase-money, all the instalments being overdue. All the averments in the plaintiff's declaration have been sustained in evidence.

The defence, whilst it puts the plaintiff on proof, amounts to what we would call a demurrer in law, and concludes thus:— "Qu'à tout événement la demande en cette cause devait être par les dits John Porteous, James Gibbs Ross, et Pierre Lafrance en leur qualité de mandataires, mais non leur propre et privé nom. Pourquoi le dit Défendeur conclut à ce que l'action des dits Demandeurs soit deboutée avec dépens distraits aux sous-signés." The Superior Court of the Province of Quebec, in which this suit was instituted (Cour Supérieure, District des Trois Rivières), pronounced its decision on the 8th of November, 1884, holding that the plaintiffs had proved their allegations and were entitled under the act of sale to recover from the defendant the balance of the purchase-money. There is no allusion in that judgment to the 19th article of the Code of Civil Procedure, or to the exception now founded on it, and therefore it would seem not to have been brought under the notice of that tribunal.

From that decision an appeal was taken to the Court of Queen's Bench for the province of Canada; but there is nothing in the reasons of appeal to indicate that any question on the 19th article of the Code was to be raised. The 19th article is in these words: "No person can use the name of another to plead, except the Crown through its recognised officers." That article is intended to express the rule of procedure previously existing in

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Lower Canada, and which, subject to numerous exceptions, represents in some respects the rule of procedure in this country, e.g. the Queen never sues in her Royal name alone. Her suit is by her Attorney-General on her behalf, or by some other public officer who has authority by Act of Parliament to enforce the rights of the Crown. Again, by the law of England a mere agent who contracts as such cannot generally sue in his own name; but he may do so, and sometimes is the proper person to sue on contracts entered into with him directly in his own name. He may be personally held liable on such contracts, and generally with us, trustees of real or personal estate, who have in them the title and possession, though but in trust for others, can sue to enforce their rights as such, and are the proper parties to enforce the contracts entered into with them in respect of the trust property, and a trustee is not regarded in the light of a mere agent "mandataire," or as a "Procureur qui a pouvoir d'ager pour un autre." But their Lordships do not deem it necessary to pursue this further, as they have to give effect to Canadian, and not to English law.

This case came before the Canadian Court of Queen's Bench, province of Quebec, and that Court reversed the decision of the Primary Court :—"Considering that the Supreme Court has already decided in the cases of *Browne et al* v. *Pinsoneault*, and of *Burland* v. *Moffatt*, that a voluntary assignment by an insolvent debtor of his estate and property for the benefit of his creditors did not confer upon the assignees the right to sue or defend in their own name the actions accruing with regard to the estates and property assigned. And, considering that the present case does not constitute an exception to the ruling of the Supreme Court." Mr. Justice Ramsay concurred, but not in the reasons of the judgment; and after stating that the reversal by the Supreme Court of the decision of the Queen's Bench in *Burland* v. *Moffatt* was a calamitous mistake, and a double error, he adds :—"But the deed in this case is of a totally different character. It carefully avoids giving respondents any title but that of trustees; and this respondents perfectly understood. They sold as trustees, and now they bring the action as principals. I do not see how this action could be maintained. If they are principals they shew

no title; if they are trustees they cannot sue as such; for no one but the Crown can use the name of another to sue. Art. 19. C.C.P." The reasons of Mr. Justice Ramsay, so far as they are reported, do not appear to their Lordships satisfactory; but in truth the majority of the Court seem to have merely followed the two prior decisions of the Supreme Court at Ottawa. Their attention does not appear to have been directed to the totally different circumstances of the present case.

Their Lordships have now to consider these two decisions, of which the earliest was *Browne* v. *Pinsoneault* (1), on appeal from the Court of Queen's Bench. There were two questions. The first was whether a particular contract was terminated by force majeure. The Court so held, and that formed a decision on the merits terminating the action. The second was whether the appellants as trustees for the creditors of Steele had a right to sustain the action for Steele's creditors though the contract was with them, the action, if any, belonging to the creditors under art. 19, and not to them. Mr. Justice Taschereau delivered the judgment of the Court on both points; but the second, or technical question, receives the first attention. He says: "The plaintiffs sue in their quality of trustees duly named of the creditors of Steele. The rule with us, contained in art. 19 of the Code of Civil Procedure, is that no one can sue 'par procureur.' Of course in certain cases, when specially authorized by law to do so, certain trustees may sue and appear before the Courts as such; so can assignees under the Insolvency Acts; but here the plaintiffs have no such standing—*they are merely the attorneys of Steele's creditors.* It is true that Pinsoneault passed the deed of April, 1879, with them, acting in their quality of such trustees, but this does not give them any right to appear as such before a Court of Justice."

Moffatt v. *Burland*, which was the other case, appears to have been decided on the 27th of May, 1884. It is reported in 4th Dorion's Cases, p. 590. It came before the Court of Queen's Bench at Montreal, and the head-note is this: "(1) A sale of a chattel may be considered as a mere pledge instead of an actual sale, and invalid as a pledge for want of delivery and posses-

(1) 3 Sup. Ct. Rep. 102.

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sion. (2) The assignee under a voluntary deed of assignment by a debtor for the benefit of his creditors, can as such assignee sue and be sued in reference to the estate and property assigned to him." With the decision of that Court on the main question their Lordships have now no concern, but the judgment of Chief Justice Dorion on the second question is remarkable, and deserves the closest consideration. The very learned Chief Justice points out that the question was whether the appellant as cessionnaire from the debtor for the benefit of creditors, was entitled to resist the action in his own name. He was not plaintiff in the suit, but was sued as defendant in respect of the trust property in his possession. The Chief Justice observes :—"But it is contended that the defendant, as the assignee of Gebhart & Co., being a mere agent or attorney, has no quality and no interest as such to appear in a Court of Justice and urge any objection against the title of the respondent. Now is this a transaction in which the old rule 'Personne ne plaide par procureur' embodied in art. 19, does apply? We have no hesitation in saying it is not." His Lordship, in a most able, elaborate, and learned judgment, considers the authorities, both French and French-Canadian, that bore on the question, and observes: "As far as we can refer back for precedents in the Courts of Lower Canada we find assignees or trustees vested by voluntary agreements with the estate of insolvent debtors for the benefit of their creditors have invariably, with one or two exceptional cases, been admitted to urge before Courts of Justice the claims and rights of the estates which they represented as such assignees or trustees." Dealing with the Canadian authorities, which he describes as an unbroken chain of precedents going as far back as 1811, he adds :—"that the jurisprudence of a country on any given case when certain is not only the best, but the sole authentic of what the law is now on the subject." We gather also from his Lordship's judgment that the rule of procedure in art. 19 is applicable only to a mere agent.

Burland v. *Moffatt* (1) is reported on appeal from the Court of Queen's Bench to the Supreme Court of Canada in the 11th Supreme Court Reports, p. 76. The judgment of the Supreme Court is the judgment of Mr. Justice Taschereau. He says that

(1) 4 Dorion, 590.

"Nul ne peut plaider par procureur" is, and always has been, the law of Lower Canada.

The case on the merits is so mixed up with the question of procedure that it is difficult to disentangle them; but undoubtedly the decision of the Court on the technical question of procedure rests on the supposed rule that a voluntary assignee in trust for creditors comes within the article "Nul ne peut plaider par procureur," and adopts the decision of Mr. Justice Badgley that the assignees of an insolvent cannot "enter en justice" for the creditors.

Their Lordships cannot interfere authoritatively with either of those decisions, but they may express their opinion on them for future guidance; and their Lordships have no hesitation in saying that the reasoning and the decisions of the Supreme Court in relation to the exception founded on art. 19 of the Code of Civil Procedure are not satisfactory, and that on the contrary they adopt the reasoning and decision of Dorion, C.J., in *Moffatt* v. *Burland* (1) as consistent with reason and law.

Their Lordships having so disposed of the two decisions of the Supreme Court, which governed the Court of Queen's Bench proceed to deal with the present case.

On this appeal they entertain not a shade of doubt that the decision of the Court of Queen's Bench was erroneous, and that the decision of the Superior Court was correct in fact and in law, and ought to be restored; and their Lordships would have come to the same conclusion if the facts of this case were in effect similar to and had not gone beyond both *Browne* v. *Pinsoneault* and *Moffatt* v. *Burland*. Their Lordships entertain the view that art. 19 is applicable to mere agents or mandatories who are authorized to act for another or others, and who have no estate or interest in the subject of the trusts, but is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate. The case before their Lordships is so different that even if the two preceding decisions were untouched they would not necessarily affect the decision of their

(1) 4 Dorion, 590.

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Lordships on the present appeal. This is not a case of a mere voluntary cession to a trustee for the benefit of creditors, but of an assignment under the Insolvent Acts to the official assignee for the purpose of realization. That officer could sue and must sue in his own name, though he has no beneficial interest. The present plaintiffs derive their title from him with the assent of all the creditors, and they are the assignees of all his rights, so far as he could transfer those rights. In addition by the composition arrangement entered into under the provisions of the 49th section of the Insolvent Act, and the subsequent acts springing from that composition, the estates moveable and immoveable have been vested in the plaintiffs in possession and in property under a mandate to preserve, to manage, to realize, to pay off charges, and distribute the surplus. The trustees, too, are empowered to act independently of the creditors in performance of their obligations and duties, and are specially authorized to enter into contracts and to enforce them. The act of sale in the present case was regular and lawful. The plaintiffs as trustees sold property to the defendant, of which they were lawfully possessed, and to which they had title. He received that title and that possession from them. They were to receive the purchase-money, and he covenanted to pay the balance of that purchase-money to them. The action is brought by the trustees on that covenant, and if they cannot enforce it in the present action there is some difficulty in defining what the remedy, if any, may be.

Their Lordships are of opinion that to hold that the present suit could not be maintained, and in the present form, would do considerable mischief, and practically defeat those compromises which constantly take place in carrying into operation the provisions of the Insolvent Act, and which can rarely be made effective without the introduction of trustees. They do not forget that in ordinary trust cases the estate is vested in the person of the trustee to accomplish the ends and purposes of the trust. In order to create an effectual trust the subject is usually vested in the trustee to preserve it, and deal with it for the objects contemplated, and whatever is essential to the purposes of the trust, if not expressed, is usually implied: thus, for

instance, if trustees are to recover and distribute funds, they may institute and carry on actions, recover payment, and discharge the debtors.

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Upon the whole their Lordships are clearly of opinion that the judgment of the Court of Queen's Bench should be reversed, the judgment of the superior Court reinstated, and the appeal to the Court of Queen's Bench dismissed with costs, and their Lordships will so humbly advise Her Majesty. The costs of this appeal will be paid by the respondent.

Solicitors for appellants: *Bompas & Co.*

[PRIVY COUNCIL.]

COMMISSIONER FOR RAILWAYS. . . DEFENDANT;

AND

BROWN . . . . . PLAINTIFF.

J. C.* 1887 *Dec.* 10.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Verdict of Jury properly found must stand.

Where there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand.

So *held*, reversing an order of the Court below which had set aside a verdict as against the weight of evidence, though it was neither unreasonable nor unfair, nor dissented from by the judge who tried the case.

APPEAL from an order of the Supreme Court (Nov. 20, 1885), making absolute a rule nisi (April 27, 1885) for a new trial in an action by respondent to recover £1000 damages for injuries alleged by the respondent to have been received by him through the negligent driving of a tram engine and carriage by the appellant's servants.

Declaration, that owing to the negligence of the appellant's servants in charge thereof the engine struck against the respondent's cart, whereby he was thrown out and sustained injuries. Plea not guilty. Verdict for the appellant.

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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No exception was taken to the judge's direction to the jury, and evidence had been given on both sides. The majority of the Court held that there should be a new trial on the ground that the verdict was against the weight of evidence.

Reid, Q.C., and *Leverson*, for the appellant, contended that this order should be set aside. There was no misdirection. There was ample evidence on which the jury could properly find a verdict for the appellant, and it had been fairly and fully presented to them. Reference was made to *Solomon* v. *Bitton* (1); *Webster* v. *Friedeberg* (2); *Metropolitan Railway Company* v. *Wright* (3); *Davies* v. *Mann* (4); *Dowell* v. *General Steam Navigation Company* (5).

The respondent did not appear.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

There is no doubt about the principles of law which have been brought under the notice of their Lordships by the appellant's counsel, and which ought to govern this appeal. Chief Justice Tindal, about fifty years since, laid down a rule to this effect: that where the question is one of fact, and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand; and that the setting aside of such a verdict should be of rare and exceptional occurrence. Their Lordships are not aware that the rule thus laid down has been abandoned.

In this particular case the proceedings appear to be according to the system of practice prevailing in England. The plaint alleges negligence on the part of the defendant. The plaintiff was bound to give some evidence sufficient if believed to sustain that allegation. Their Lordships assume, for the purposes of the appeal, that there was evidence of negligence in the absence of the stoker, whose duty was to keep on the look-out if he was not otherwise engaged in his duties as stoker. But it may be a

(1) 8 Q. B. D. 176.
(2) 17 Q. B. D. 736.
(3) 11 App. Cas. 152.
(4) 10 M. & W. 546.
(5) 5 E. & B. 195.

subject of question whether the absence of the stoker led to the accident. The driver says that he had a clear view in front, and that he saw the head of the horse the plaintiff was driving immediately when it emerged from Elizabeth Street. If the stoker had been beside him, he could not have seen more than the driver saw. So that although their Lordships assume that there was evidence proper to be submitted to the jury that there had been negligence on the part of the defendant which may have led to the calamity, it does not go beyond that.

Then on the other hand there was what appears to their Lordships to be very clear evidence proper to be submitted for the determination of the jury, and properly received under the plea of not guilty, that the plaintiff by his own negligence had contributed to the calamity. The law in such a case is that the two questions are to be submitted to the jury, and they are to determine, first whether there is negligence on the part of the defendant materially leading to the calamity, and secondly whether there was contributory negligence on the part of the plaintiff but for which the calamity would not have occurred. It is conceded that the case was properly submitted to the jury, and that the summing-up of the case was correct in all respects and not objected to in any particular. Mr. Justice Faucett is represented to have said: "Under these circumstances what is the evidence? That the plaintiff was coming out of this street at a rapid pace, slashing his horse as he came to the tramway. He saw that his horse was frightened by the children, and he lost his head, and slashed away to cross the line. The tram came slowly up, not rapidly, to the place where it was to stop." That sentence alone, containing the learned judge's view of the evidence, affords the amplest and most persuasive proof of contributory negligence on the part of the plaintiff. What really took place seems to have been probably that the plaintiff was driving down Elizabeth Street, and his horse got into an excited state from the noise of some children. One of the witnesses says that when the plaintiff could have seen the motor coming up he rose in his seat and commenced slashing the horse. The object of that was that, having a spirited horse, he thought that spirited horse would have carried him clear of the motor by being a little accelerated,

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and then he commenced accelerating the pace of the horse so as to rush past the motor. He had no business to do that. When he saw there was danger of collision his duty was at once to have held his horse in. It was a matter of seconds. The delay of a few seconds would have prevented this calamity, but he chose to make a rush across, and, in fact, instead of the motor running into him he ran into the motor.

Under such circumstances the case was fairly submitted to the jury. There is no objection to the summing-up. The learned judge who tried the case does not disagree with the verdict, and their Lordships are of opinion that the verdict, not unreasonable or unfair, and which was warranted by the evidence, once found ought to have been permitted to stand. Their Lordships therefore will humbly advise Her Majesty that the verdict ought to be suffered to remain as it was, and that the order setting aside that verdict should be discharged; and the appellant will have the costs in the Court below and of this appeal.

Solicitors for appellant: *Want & Harston.*

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Nov. 11, 15, 16, 17, 18; *Dec.* 3.

[PRIVY COUNCIL.]

THE GRAND JUNCTION AND THE MIDLAND RAILWAYS OF CANADA . . } PLAINTIFFS;

AND

THE CORPORATION OF PETERBOROUGH DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Law of Ontario—34 *Vict.* c. 48—37 *Vict.* c. 43—*Incorporation of Railway Company—Validity of Municipal Bye-law—Conditions precedent.*

Held, that under Ontario Act 34 Vict. c. 48, the Grand Junction Railway Company was recognised as an incorporated company; otherwise that it was actually incorporated by Act 37 Vict. c. 43; the effect of the two Acts being to give to the company so incorporated the benefit of a bye-law of the respondent corporation, which, under certain conditions, provided a bonus for the railway.

Held, further, that under the Act of 1871 the said bye-law was legal, valid,

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

and binding on the corporation, but that the railway company had not on the evidence complied with the conditions precedent. The stipulated certificate of the chief engineer had not been produced, and although under paragraph 8 of the bye-law debentures might be delivered to trustees without a certificate, that applied to a time when the debentures or their proceeds were to be held in suspense, not to a time when the trusts were spent and the payment, if made at all, should be made direct to the company.

APPEAL from a decree of the Court of Appeal (Sept. 7, 1886) confirming a decree of the High Court, Queen's Bench Division (Mar. 28, 1885).

The question in the appeal was whether the appellants were, by virtue of a certain bye-law, referred to in the judgment of their Lordships, entitled to recover from the respondents a sum of $75,000, or some part thereof, or to have debentures for a corresponding amount issued to them or to trustees on their behalf. By their statement of defence the respondents in effect alleged (1) that the bye-law in question was invalid; (2) that the appellants, the Grand Junction Railway Company, were not the company referred to therein; (3) that the appellants had not performed the conditions upon which, by the terms of the bye-law, the moneys claimed became payable; (4) that the matter was res judicata, by virtue of certain former proceedings in the Canadian Courts; (5) that the appellants' claim was barred by laches on their part and by the Statute of Limitations.

The judgment of Galt, J., before whom the action was tried without a jury, was in favour of the respondents, holding that the bye-law was invalid, and also that the appellants had not in fact constructed their line on the route indicated by clause 7 of the bye-law. In appeal, Hagarty, C.J., Paterson and Osler, JJ., dismissed the appeal, in deference to the views expressed by the Supreme Court of Canada on a former appeal between some of the same parties relating to an application for a mandamus. Their judgments will be found in 13 Ontario App. Rep., p. 420.

The decision of the Supreme Court had been obtained in the following way. Prior to the commencement of this action, and before the completion of the railway, an application had been made on the part of the first-named appellants by motion for a prerogative writ of mandamus to compel the respondents to issue

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debentures to the amount specified in the said bye-law, and to deliver the said debentures to trustees. The proceedings on this application and on the appeals therefrom were put in evidence in the trial. A rule nisi was granted on November 21, 1879, and after argument was made absolute. The case is reported in 45 U. C. Reports at p. 302.

The respondents appealed to the Court of Appeal for Ontario, and the judgment of the Court below was reversed, and the motion for a mandamus dismissed. This judgment of the Court of Appeal was affirmed by the Supreme Court of Canada. The decision of the Court of Appeal of Ontario is reported in 6 U. C. A. R. 339, and the decision of the Supreme Court in 8 S. C. R. 76.

The grounds upon which the Supreme Court proceeded, by which the Court of Appeal held themselves bound in this case, were, first, that upon the affidavits then before the Court it appeared that the bye-law as submitted to the ratepayers was not identical in language with the bye-law as submitted for first and second reading to the Council, that it was consequently not capable of being validated by a third reading, and that under these circumstances the 2nd section of the 34 Vict. c. 48, did not render it valid. Secondly, that the Dominion Act of 1870 being ultra vires, there was at the date of the bye-law no such corporation as that referred to in the bye-law in existence or capable of taking a grant. Neither Galt, J., nor the Court of Appeal of Ontario, held in this case that the appellants were estopped by the judgment in these former proceedings.

Sir *Horace Davey*, Q.C., and *E. Blake*, Q.C., of the Canadian bar (*Gore*, with them), for the appellants, contended that the judgment of the Court of Queen's Bench should be reversed. The bye-law was the foundation of the action, and although that was not originally passed in strict compliance with the statutory provisions in its behalf, yet it had been made valid for all purposes by Ontario Act, 34 Vict. c. 48, treated as valid by subsequent legislation, and was binding on the respondents. Reference was made to sects. 2 and 6 of the Act, and to the appointment of trustees under sect. 6; for subsequent legislation, see Ontario

Act, 39 Vict. c. 71, s. 6. Assuming the bye-law to be valid the plaintiff company is the company designated in it. The history of its incorporation is as follows: By 16 Vict. c. 43 (Province of Canada) the Grand Junction Railroad Company was incorporated for a specific purpose. Next year it was united by statute with various other railway companies, under the name of the Grand Trunk Railway Company of Canada. By 33 Vict. c. 53 (Canada) all the corporate powers, rights, and privileges which had been vested in the Grand Junction Railroad Company were restored to and vested in the first-named appellants under the name of the Grand Junction Railway Company. It was contended that the first appellants were duly incorporated by this Act, which was within the powers of the Dominion Parliament. If ultra vires, it had been confirmed ab initio by Ontario Act, 37 Vict. c. 43, and the corporation referred to was recognised, confirmed, and adopted. By Ontario Act, 45 Vict. c. 67, the Grand Junction Railway Company and certain other companies were amalgamated under the name of the Midland Railway Company, but certain rights of suit were reserved to the first-named company. Reference was made to *Galloway* v. *Mayor and Commonalty of London* (1) as to whether, under these circumstances, there existed a corporation capable of taking under the bye-law. There was a body-engaged in an enterprise which the legislature authorized. That body was allowed to approach parliament by petition, and it was an association of persons engaged in a common enterprise who were recognised under a corporate name by the legislature. The construction of an Act must be ut res magis valeat, and, inasmuch as no effect could be given to this legislation unless the incorporation of the plaintiff company be assumed, it would be meaningless unless such a corporation be assumed to exist. Reference was made to *Spratt* v. *Jeffery* (2).

As regards the question of the fulfilment of the conditions of the bye-law, it was contended upon the evidence that they had been complied with, or must be deemed to have been complied with, and also that the non-performance of the conditions specified in clause 7 of the bye-law was no answer to that portion of the

(1) Law Rep. 1 H. L. 34.

(2) 10 B. & C. 249.

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claim which related to the making over of debentures to the trustees. As to the finding of Galt, J., that the route had not been observed, reference was made to *Commissioners of Johnson County* v. *Thayer* (1).

The main question was whether the railway was de facto commenced in proper time or not. The other side say that no plans were deposited, and therefore it was not de jure commenced. The absence of a certificate from the engineer is immaterial, for that was a condition introduced for the benefit of the railway company. Besides it has nothing to do with sect. 8 of the bye-law. The trustees were appointed by the legislature, and the company has a right that the debentures should be delivered up to them.

With reference to the question of res judicata it was contended that the only question adjudicated upon in the mandamus proceedings was the right of the appellants to relief by way of mandamus, and not any of the questions raised in this case. There were dicta in those decisions unfavourable to the appellants, but it was stated in some of the judgments that they did not decide as to the appellants' right of action.

The Attorney-General (*Sir R. Webster*) and *Jeune* (*Edwards*, of the Ontario bar, with them), contended, first, that the corporate character of the appellants had not been made out. There was no corporation existing entitled to the $75,000, nor was there any at the time the bye-law was passed. The earliest Act relied upon is 16 Vict. c. 43. That Act (s. 2) must be read with the Railways Clauses Consolidation Act of 1851, s. 22, sub-s. 6, which provided that in the events which happened in this case the corporate existence and powers of the company to which 16 Vict. c. 43 related should cease. The Dominion Act of 1870 was, under the provisions of the British North America Act, 1867, ultra vires for the purpose of constituting the corporation of the first-named appellants. If the Dominion Act was intra vires it followed that the Ontario Acts relating thereto were ultra vires. The Act of 1871 did not intend or purport to create a corpora-

(1) 94 U. S. Rep. 631.

tion; it proceeded upon a mistake of fact that a corporation already existed. Reference was made to *Munro* v. *Butt* (1). The Act of 1874 did not incorporate retrospectively: see sects. 4, 5, 16 and 17. Then with regard to the validity of the bye-law, it was ultra vires the respondent municipality: see Municipal Act of 1866 (29 & 30 Vict. c. 51 of Canada), ss. 6, 190, 192, 196, 225, 226 and 227; there is no power conferred by the Act to make a gift of money to a railway company. It was not validated by the Act of 1871; a mistaken recital of law in an Act does not create law. Reference was made to *Dore* v. *Gray* (2); *Ex parte Lloyd* (3); *Earl of Shrewsbury* v. *Scott.* (4) The decisions on the application for mandamus constitute a res judicata. The same conditions were in issue there as here. [LORD FITZGERALD:—Is there any authority to the effect that the dismissal of a rule nisi is a final judgment.] Reference was made to *Barrs* v. *Jackson* (5), *Outram* v. *Morewood* (6), and 2 Smith's L. C. 860.

Further, the conditions of the bye-law had not been complied with. There was no bonâ fide and operative commencement of the railway within the time limited, and therefore the bye-law became void and of no effect. There was no deposit of plans: see sect. 10 of the Railway Act, sub-sect. 8. No certificate of the chief engineer of its completion was obtained, nor was it completed as stipulated. Reference was made to *In re Stratford and Huron Railway Company and County of Perth* (7); *Commissioners of Johnson County* v. *Thayer* (8); *Canada Atlantic Railway Company* v. *City of Ottawa* (9). Further, no trustees were ever appointed within the meaning of the bye-law, clause 8. The trustees appointed by the legislature would not hold on the same trusts as those contemplated by the bye-law. The bye-law, too, only expressed an intention to make a gift to the company, not to confer a right of action.

Blake, Q.C., in reply.

(1) 8 E. & B. 738.
(2) 2 T. R. 358, 365.
(3) 1 Sim. (N.S.) 250.
(4) 29 L. J. C. P. 53.
(5) 1 Y. & C. 585, 595.
(6) 3 East, 346.
(7) 38 U. C. Q. B. 112.
(8) 4 Otto; 94 U. S. Rep. 631.
(9) 8 Ontario Rep. 183, 212, 219, 12 Ontario App. 234, and 12 Sup. Ct. Can. Rep. 365.

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1887. Dec. 3. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The numerous questions which present themselves in this intricate case have been argued very fully during the space of several days. Not that they have been treated at too great length; on the contrary, their Lordships consider that the counsel on both sides have done as much as their cases required, and no more; and they wish in especial to acknowledge the way in which the gentlemen of the Canadian Bar have aided the argument by their experience in Canadian law and their candour in imparting it. But from the completeness with which all the questions were threshed out, their Lordships have formed opinions on the most important ones during the argument, and are now justified in expressing them very briefly.

On four of these questions their Lordships' opinions were indicated before the close of the argument, and may now be repeated. First, it is impossible to give due effect to the Ontario Act of 1871, without holding that the Grand Junction Company, which was then in fact carrying on business under a charter invalid in law but not known to be so, was empowered to receive money in order to construct and equip the railway, and to do any of the works authorized by that charter, and this implies incorporation. Secondly, if the company had not been incorporated by that enactment, they would be so by the Act of 1874; and the effect of the two Acts is to give to the plaintiffs, who are the Grand Junction Railway Company so incorporated, all the benefit of the bye-law which was voted on by the ratepayers of Peterborough, and which provided a bonus for the de facto Grand Junction Railway Company. Thirdly, the effect of the Act of 1871 is not only to charge the rates and to cure the lack of a third reading, but to make that bye-law which the ratepayers voted on, legal, valid, and binding on the corporation. Fourthly, that the refusal of the prerogative writ of mandamus cannot be pleaded as res judicata in bar of this suit; because, first, the jurisdiction exercised in such a refusal is a discretionary jurisdiction, and, secondly, if the mandamus had been granted it would not have bound the other side to anything except to make a return to it.

Their Lordships are further of opinion that the Plaintiffs' works were completed in time. The Act of February, 1876, enlarged the time for completing "the Grand Junction Railway" till the 1st of May, 1881. There is no reason for cutting down the generality of this expression as the respondents urge. In fact it would be very unlikely that in February, 1876, an extension of time should be required for that part of the railway which need not be completed till May, 1880, and not for that part which was to be completed by May, 1876.

It was earnestly contended by the defendants that the railway has not been constructed in accordance with the conditions of the bye-law. Those conditions were, that "the said Grand Junction Railway" shall be completely graded to the town of Peterborough, that the iron of "the said railway" shall be completely laid to the town of Peterborough, that the line shall cross the River Trent at a certain point, and proceed between certain villages. All that has been done, and apparently upon land acquired in the usual way by the company, except for the last two miles or so nearest Peterborough, where the plaintiffs have availed themselves of an unused tract and station grounds, formerly belonging to another company, called shortly the Cobourg Road.

The plaintiffs hold this unused tract under a written agreement confirmed by the legislature. By the agreement, the Cobourg Road demise and grant to the plaintiffs the right to use the unused tract and grounds for ever, free from rent, on two conditions. The first is that the plaintiffs shall, at their own cost, repair and put in efficient working order so much of the tract and premises as they require to use, and so keep the same; and the second is that, in a certain event, the Cobourg Road shall have the right to use the road and premises so used by the plaintiffs, upon terms to be agreed upon or settled by arbitration. It is argued that this right of the Cobourg Road prevents the plaintiffs from saying that the railway, which has been constructed by them according to the terms of the bye-law, is their railway. Their Lordships think that the grading is the grading of the Grand Junction Railway, and the iron is the iron of that railway, none the less because they hold the land only

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under a grant of perpetual use, or because another company may claim privileges often accorded to one company over the works of another.

Another condition of the bye-law is that unless the construction of the railway as to the portion within the county of Peterborough is commenced on or before the 1st of May, 1872, the bye-law, so far as it provides for the issue of debentures for $75,000, shall be void. It is not disputed that to satisfy the condition the commencement must be a substantial commencement, followed up by substantial exertions to continue the work. Now some work was done on the land of a Mr. Johnson on the 17th of April, 1872, but both the secretary and the president of the plaintiffs say that it was done formally, and in order to save the bye-law. Still if that formal commencement, though accelerated in order to save the bye-law, were followed up in good time by active and continued work, it might be sufficient. And the plaintiffs' witnesses go on to shew that some further work was done in Peterborough county, and that by November, 1874, about $600,000 was expended on the works of the line. On the other hand, it appears that on Johnson's land the work was discontinued after two or three days, and not resumed till the year 1880; that up to November, 1874, not more than $24,000 is even alleged to have been spent in Peterborough county; that the plaintiffs did not make any contract for the work till the 25th of March, 1872; that they then handed over all the business to Brooks the contractor, but did not make any stipulation as to the time when he should commence the Peterborough works, or any works; that the plans required by law for the exercise of compulsory powers were not lodged till June, 1873; that on the 28th of May, 1872, it was brought before the board of directors that anxiety was felt by stockholders and by parties interested in consequence of the unexpected delay in commencing the work vigorously, and that the board resolved to ask the contractor to name as early a day as possible for the formal opening. On this evidence their Lordships are not satisfied that there was any substantial commencement of work in Peterborough county as early as the 1st of May, 1872, so as to fulfil the condition of the bye-law.

There is yet another condition of the bye-law, viz., that payment shall be made only on the certificate of the engineer of the plaintiffs as to a portion of the work stipulated for. This condition has not been performed, but the plaintiffs urge that it does not apply to the issue of debentures to trustees, and that they ought to have relief in that form. This part of the case requires to be stated in somewhat more detail.

The bye-law provides that the sum of $75,000 shall be paid to the plaintiffs in debentures, and that the warden shall pay and deliver such debentures, as to $25,000 when the railway has been graded, and as to $50,000 when the iron has been laid, as before mentioned; "and then only upon the certificate of the chief engineer of the said railway of the performance of the said conditions." The 8th clause of the bye-law runs as follows:—

"That, in the event of any trustee or trustees being hereafter appointed by the legislature for the receiving and holding of moneys or securities for moneys awarded by way of bonus towards the construction of the said Grand Junction Railway, the said warden shall, within six weeks after the final passage of this bye-law, or within six weeks after the passing of such legislative enactment, whichever shall last occur, hand over and deliver such debentures, to the said amount of seventy-five thousand dollars, to such trustee or trustees, to be by them held and paid over and delivered to the said company, in accordance with and subject to the provisoes and conditions of this bye-law, and not otherwise."

By the Ontario Act of 1871 it is enacted that, when any municipality shall grant a bonus to aid the company in making the railway, the debentures therefore may, at the option of the municipality, within six months after the passing of the bye-law authorizing the same, be delivered to three trustees to be named, one by the Lieutenant-Governor in Council, one by the company, and one by the heads of municipalities granting bonuses, who were to meet and vote as therein prescribed. The trustees are to receive the debentures upon trust; first, to convert them into money; secondly, to deposit the money in a bank in the name of the "Grand Junction Railway Municipal Trust Account"; thirdly, to pay such money out to the company on the certificate

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of their chief engineer, setting out the portion of the railway to which the money paid out is applied, and the total amount expended on such portion to the date of the certificate. These provisions are repeated in the Act of 1874. Trustees have been appointed in accordance with them, and such trustees still exist.

On the 21st of November, 1879, the plaintiffs obtained a rule nisi for a mandamus commanding the defendants forthwith to issue debentures for $75,000, and to deliver those debentures to the trustees appointed for receiving bonuses. At this date the work was not done. It was completed about the 27th of November, 1880, and opened for traffic on the 6th of December, 1880. It is obvious, therefore, that at this time the plaintiffs were not in a position to ask for any payment or delivery to themselves.

The plaintiffs obtained a rule absolute from the Court of Queen's Bench, which however was set aside by the Court of Appeal in Ontario, and that decision was upheld by the Supreme Court of Canada. In that Court, at least two of the Judges rested weight on the circumstance that in 1872, when they commenced working, the plaintiffs had the same right to ask for delivery to trustees as they had when they moved for a mandamus, and that if they were now right in saying they had completed the work they were in a position to insist upon payment to themselves.

The Supreme Court disposed of the case in 1883. The judgment was delivered in January, 1883, and the case will be found reported in 8 Supreme Court Reports, p. 76. This action was brought in April, 1884. The prayer is to the effect that the defendants may be ordered to pay $75,000 to the plaintiffs, or that a mandamus may issue to compel the defendants to issue debentures for that amount, and to deliver the same to the plaintiffs. The plaintiffs expressly averred that all conditions precedent had been performed, and that the chief engineer's certificate had been duly given in accordance with the terms of the bye-law. The defendants insisted that the plaintiffs shall prove strictly the performance of every condition precedent.

At the trial no certificate was forthcoming. The plaintiff's counsel proposed to recall a witness, one of the statutory trustees, to prove that a certificate had been given, but that witness was

not recalled. He also urged that, under paragraph 8 of the bye-law, debentures might be delivered to trustees without a certificate; that the statutory trustees were trustees within the meaning of the bye-law; but that if the Court thought otherwise, it could appoint trustees; and that the pleadings might be amended for the purpose.

It is clear that from the 27th of November, 1880, when the works were completed, until now, there has been no engineer's certificate. It was suggested rather than argued at the Bar, that the certificate was intended for the sole benefit of the plaintiffs, and further that to give the certificate had become an impossibility, because the original engineer was dead, but those suggestions met with no acceptance from their Lordships. It certainly would seem that, after a railway has been at active work, a certificate that it has been completely graded and the iron completely laid would be a matter of course. Even then the defendants expressly stipulated for it as a condition of their liability, and as it is not forthcoming they are not liable. But the necessity of it is, and must always have been, so obvious, and its absence is so unaccountable, as to point to the existence of some substantial difficulty, though its nature is not apparent.

As regards delivery to trustees, it was not argued at this Bar that the Court could appoint trustees, but it was contended that the pleadings might be amended by praying delivery to the statutory trustees, and that relief might be given in accordance with that prayer, for which the bye-law does not require a certificate. Such amendments at such a stage of the suit are quite exceptional; they are apt to be attended with great inconvenience, and should not be granted except in obvious cases, where it is clear no injustice would be done. In this case, their Lordships think it unnecessary to inquire whether an appointment by donees of powers conferred by the legislature is an appointment by the legislature such as the bye-law contemplates; or whether the trusts differ in such a way that the statutory trustees cannot lawfully receive debentures upon the provisoes and conditions of the bye-law. The substantial objection to the plaintiffs' request is that the trusts are spent. The time for acting through trustees is past, as was pointed out by Mr. Justice Gwynne in the

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Supreme Court, and as was clearly seen by those who framed this claim. Trustees were for the time when the debentures or their proceeds were to be held in suspense, not for the present time, when the plaintiffs, if right in other respects, can claim the payment directly to themselves. If the trustees were to take the debentures either on the trusts of the Acts or on those of the bye-law, they would have no duty except to hand them over to the plaintiffs upon the engineer's certificate. Their Lordships are asked to use a purely illusory machinery for no purpose whatever except to relieve the plaintiffs from the observance of a condition precedent, which, either by extraordinary neglect or from some unexplained difficulty in substance, they have left unperformed. They cannot do that. They will humbly advise Her Majesty that this appeal should be dismissed. And the costs must follow the event.

Solicitors for the appellants: *Bompas & Co.*
Solicitors for the respondents: *Robinson, Poole, & Robinson.*

[PRIVY COUNCIL.]

DE MONTFORT . . . . . PLAINTIFF;

AND

BROERS . . . . . DEFENDANT.

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Dec. 22.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of the Cape of Good Hope—Power to compromise—Heir subject to a Fidei-Commissum.

Where testator's daughter, on attaining the age of twenty-five, took the residue of his estate burdened with a conditional fidei-commissum, there being no bequest to the executors, who were only appointed administrators, the will not debarring the daughter from the inheritance as heir by birth, and at 25 as heir burdened with a fidei-commissum, and the daughter entered into an agreement of compromise with the executors of all her claims arising out of their administration of the testator's estate, which compromise did not involve any alienation of property :—

Held, in a suit by her infant children for substantially the same relief as had been the subject of the said compromise, that they were bound thereby. The daughter, under the law of the Cape of Good Hope, fully represented the estate, and her children had the same interest as herself.

APPEAL from a decree of the Supreme Court (Jan. 7, 1886) made upon the argument of an exception filed by the respondent, and treated by agreement as a plea of res judicata.

The subject of the appeal was the right of the minor heirs of the testator, Jacob Letterstedt, of whose will the Board of Executors of Cape Town were the executors, to have the settled accounts of the said executors again debated, and to have certain charges of wrongful allowance of commission, and of negligent and imprudent conduct of business arising upon the same accounts, again heard and decided, notwithstanding that all the questions so proposed to be re-opened had been the subject of previous litigation, including an appeal to Her Majesty in Council, in which judgment was given on March 22, 1884, reported in 9 Appeal Cases, 371.

* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The facts are stated in the judgment of their Lordships. The judgment of the Supreme Court was to the effect, first, that by the residuary devise and bequest, which is set out in their Lordships' judgment, the testator's daughter was constituted the fiduciary heir and dominus of his residuary estate, and that her children were substituted or fidei-commissary heirs only if they should survive her, and being male attain the age of twenty-one years, or being female attain that age or marry; secondly, that although the compromise effected by the daughter in 1874 would not have been binding on any persons entitled in remainder expectant on her decease, unless she was fiduciary heir and dominus of the residuary estate, yet that, as such fiduciary heir and dominus, she had by law authority to bind, and did thereby effectually bind, the remaindermen.

Sir *H. Davey*, Q.C., and *Jeune* (*Elgood* with them), for the appellant, contended that the consent order or compromise of 1874 was not binding on those entitled at the testator's death in remainder expectant on the death of his daughter; and that consequently the order did not bar the claim made in the present action. The daughter of the testator did not represent his estate. The scheme of his will was that the residuary estate should remain in the hands of his executors as trustees. The dominium thereof remained in the executors, and the daughter was a mere usufructuary or equitable tenant thereof for her life. Her children took a vested interest therein at a specified time, independently of whether they survived her or not. That the executors were intended to be trustees is clear from the fact of the will containing provisions which could not be worked out except through the medium of trusts. Moreover, the judgment in 9 App. Cas. 387 treated the Board of Executors as trustees throughout—so also did the Order in Council made thereon. In any view the residuary estate vested in them as trustees in 1874, the date of the compromise. There was no one else in whom it could vest, for the daughter took no vested interest under the will, either as usufructuary or as fiduciary heir, until she attained the age of twenty-five, which was in 1878. On the other hand even if in 1874 the daughter had been the fiduciary heir and

dominus of the testator's residuary estate, still she had not by Roman-Dutch law any authority to bind the remaindermen by a compromise. Reference was made to Burge's Colonial Law, vol. 2, pp. 83, 87, 103, 120, and 166; Van der Linden, bk. 1, sect. 8, where the law is stated as to fidei-commissum and its creation; Van der Keessel, Lorenz's translation, bk. 3, c. 4, sect. 3, No. 516, to the effect that a fiduciary heir cannot alienate the property without the consent of the fidei commissary, and to Voet, 2, 15, 8. If the statements in the declaration in this case be true, the compromise resulted in the alienation of a considerable portion of the business. Reference was also made to *The Heirs Hiddingh* v. *Denyssen* (1). It is the duty of a fiduciary heir making a compromise, where infants are concerned, to bring the facts fairly before the Master or other authority whose sanction should be obtained: *Brooke* v. *Lord Mostyn* (2).

Rigby, Q.C., and *Costelloe*, for the respondent, contended that by the true construction of the will the testator, who was domiciled in the Cape of Good Hope, and subject to Roman-Dutch law, had constituted his daughter his fiduciary heir, and that as such fiduciary heir she was capable of binding, and did bind, those interested in remainder by her compromise. The Roman-Dutch law is widely different from English law. By the former law the heir takes up the personality of the deceased from the moment of death. A testator has by that law no power to create an heir at a fixed future time. As regards fidei-commissum it was in its inception under the old Roman law a mere precatory trust, with no legal effect whatever to prevent the heir from taking beneficially. Yet it is contended on the other side that this is similar to an English settlement, the heir to be treated as an English devisee accompanied by contingent remaindermen with vested interests. [LORD HOBHOUSE:—It was said that the machinery of trusts had been introduced, and that the provisions of the will could not be carried out without them.] Reference was made to Grotius on Roman-Dutch Law, bk. 2, c. 18, sects. 20, 21, p. 138 of Herbert's translation. The daughter having complete dominium as fiduciary or other heir had full power to compromise. She

(1) 12 App. Cas. 624. (2) 33 Beav. 457; 2 De G. J. & S. 418.

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was instituted heir subject to a condition: Grotius, bk. 2, c. 20, sect. 6. [SIR BARNES PEACOCK:—Can she come in as heir when the testator appointed executors?] The executors did not take. They of course had duties as procurators for the estate, but they had neither dominium nor usufruct. The daughter was none the less instituted as heir because executors were appointed. If she had not been instituted heir by the will, the dominium would have been in the hæres legitimus, not in the executors. As to the passage in Van der Keessel, No. 516, it is a commentary on Grotius, bk. 3, c. 4, sect. 3, according to which guardians may compromise "provided they do not by such compromise alienate any immovable property." See also Van der Keessel, No. 311. [LORD HOBHOUSE referred to Van der Keessel, No. 323.] With regard to the passage in Voet, 2, 15, 8, it is very much more than a mere dictum. It is an argument that a compromise or alienation under the careful conditions which he lays down, all of which are present in this case, may be permitted. The fideicommissary must act bonâ fide, and the right in respect of which he acts must be doubtful. Thus it is unnecessary to require the consent of one whose interest and succession are doubtful. Reference was made to *De Mora* v. *Concha* (1).

Sir *H. Davey*, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal arises out of a protracted litigation concerning the estate of Jacob Letterstedt, who died in March, 1862, leaving him surviving his wife, Lydia Letterstedt, and an only daughter, Lydia Corinna Letterstedt. Jacob Letterstedt carried on in his lifetime a brewing, distilling, and malting business at Mariedahl, in the suburbs of Cape Town, and at Cape Town. By his will he directed that this business should be carried on after his death as the same was carried on by him, and that his executors should advance capital for that purpose. This capital was to be sufficient, but not to exceed £10,000. He

(1) 29 Ch. D. 268, 284.

further directed that the profits of this business should, until his child or children attained the age of twenty-five years, be divided into six shares, whereof four shares should be for the benefit of his child or children, one share for the manager of the business at Mariedahl, and one share for the manager at Cape Town. He appointed David Thompson to be manager at Mariedahl, and Oscar Hedelius, and failing him Tobias Spengler, to be manager at Cape Town.

The testator also carried on a business in partnership with Oscar Hedelius under the name of Jacob Letterstedt & Co. There is no direction in the will with reference to this business, but by the deed of partnership the testator was not bound to carry it on after the 1st of January next after Hedelius' death. Hedelius died in July, 1863, and therefore the executors were not authorized to carry on this business after the 1st of January, 1864. They carried it on, however, till the end of 1872, after which it was put in liquidation. This is the business which, in the litigation, is called the unauthorized business. The will, after giving specific legacies to his wife and daughter, and other legacies, and also giving directions concerning the brewing, distilling, and malting business, contained the following clauses:—

"And I devise and bequeath all the rest, residue and remainder of my estate, property, and effects, as well moveable as immoveable, and wheresoever situate, and whether the same be in possession, reversion, remainder, or expectancy, which shall remain after payment of my just debts and funeral and testamentary expenses, and not hereby otherwise disposed of, unto my said daughter, if and when she shall attain the age of twenty-five years, or marry under that age, the same to be bound with fideicommissum, so that my daughter may enjoy the interest, dividends, and annual income thereof, to be paid to her annually upon her receipt, or in case of her absence from the place of residence of my executors, upon a power of attorney to be executed by her, and which interest, dividends, or annual income shall not be under the control of any husband whom she may marry, but shall be applied solely for her use and benefit; and after her death the said residue shall be paid and belong to her child or children upon such child or children attaining the age

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of twenty-one years being male, or attaining twenty-one years or marrying with consent of parents or guardians being female, and if she shall die without leaving any child or children who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall live to attain that age or marry, I give and bequeath my estate, property, and effects, subject to the legacies and bequests hereby given, to the person or persons who, according to the law of the Cape of Good Hope, would be entitled thereto if I died intestate and unmarried.

"If I should leave any child or children hereafter born, who being a son or sons shall attain the age of twenty-five years, or being a daughter or daughters shall attain that age or marry under it, I declare that such child or children shall participate in all the legacies, bequests, and benefits hereby given to my said daughter in equal shares with her, and in that case I revoke and withdraw from this will the last clauses hereinbefore contained.

"And I direct that all moneys and effects which shall accrue by way of rents, profits of business, or otherwise, shall be paid to the Board of Executors as follows, that is to say, the said rent within six months after the same shall become due, and the said profits within six months after the books shall be closed, and the profits of the business ascertained."

The will then, after an appointment of guardians of his daughter, said:—

"I appoint Tobias Spengler, per Oscar Hedelius, and the Board of Executors at Capetown, the executors of my will and testament and administrators of my estate, with all such power and authority as is required in law, and especially the power of assumption, substitution, and surrogation.

"I give to the said Board of Executors an annuity of one hundred pounds sterling so long as the business at Mariedahl shall be carried on."

Finally, after some directions not now material, the testator declared that his will should be construed and his property be distributed under it in accordance with the law of the Cape of Good Hope.

The position of an executor under the Roman-Dutch law is

thus stated by Van der Keessel, in his Select Theses on the Laws of Holland and Zeeland, Thesis 323, Lorenz's Translation, p. 116:—"The executors of a testament, since they are, as it were, procurators appointed by the testator to manage his funeral, to recover what is due to him, to pay his legacies and debts, and to administer his property until a division thereof can be effected, and since therefore they manage the affairs of the heirs also, cannot debar the heirs from the inheritance, unless the testator has directed otherwise, nor alienate the property without their consent. And hence it has not improperly been enacted at Middleburg that if all the heirs agree amongst themselves, they may, after payment of what has been left to the executors in the testament, and on giving security to carry out the will of the deceased within a year, remove them from the office." The words in the will which follow the bequest to Miss Letterstedt in fidei-commissum when she attains twenty-five or marries cannot be construed as intended to debar her from the inheritance expressly given to her. If effect cannot be given to them according to the law of the Cape of Good Hope, they are inoperative. There is no bequest of the estate to the executors. They are only appointed administrators, and the will does not, in their Lordships' opinion, contain any direction which can be construed as debarring Miss Letterstedt from the inheritance as the heir by birth of the testator until she attained twenty-five or married, and after that time as the heir burthened with a fidei-commissum. Van der Keessel, Thesis 311, Lorenz's Translation, p. 112, says:—"A person instituted heir from a particular time does not become heir before such time, and the legitimate heir will in the meantime be the heir. Similarly, a person appointed heir up to a certain time ceases to be heir after such time, and the person whom the testator has substituted either directly (as in the case of military substitution), or by way of fidei-commissum, or, failing such substitute, the legitimate heir of the deceased, will succeed to the inheritance."

This being the position of Miss Letterstedt, in February, 1874, an action was commenced by Mr. Fairbridge, an attorney, as her curator ad litem, she being then a minor. On her attaining her majority in May, 1874, the record was amended so as to make

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her the plaintiff. In this action the plaintiff sought to have the accounts furnished to the guardians, in accordance with a direction in the will, up to and including the 31st of December, 1872, amended by omitting all charge for commission, and claimed that the defendants should be ordered to refund to the estate a sum of £28,512 2*s.* 4*d.*, which they had allowed themselves for commission, partly on gross sales in the unauthorized business in which she then alleged large profits had been made; and she prayed for a declaration that the defendants were not entitled to make any charge for commission, as they had received the annuity of £100 as provided by the will. The action came on for trial in October, 1874, but was not tried out, as a compromise was come to. The record states that, on the 26th of November, 1874, having heard Mr. Attorney-General Jacobs, of counsel for the plaintiff, who handed in a consent paper signed by counsel for the parties respectively, and prayed judgment in the terms thereof, and having also heard Mr. E. J. Buchanan, of counsel for the defendant, who consented to judgment in terms of the said consent paper, the Court grants judgment accordingly in terms of the said consent paper, which is in the words and figures following, that is to say:—

"It is hereby agreed that judgment shall be entered in favour of the plaintiff upon the following consent paper:—

"1. That the defendants shall, on account of the charges on the gross sales claimed in this action, refund the sum of £21,000 (including a sum of about £8000 lying undrawn in the defendants' hands), in settlement of every claim or demand that can or may be made on the defendants in connection with their administration of the estate of the late Jacob Letterstedt, and of all transactions relative thereto, or business connected therewith, up to the 31st of December, 1872, inclusive.

"2. That the said sum of £21,000 shall be taken to include any amount which may be claimable and payable to Mr. Thompson in his capacity as manager at Mariedahl for his one-sixth share of the profits of the brewery and distillery business up to the said 31st of December, 1872; and that, subject to such claim or demand of Mr. Thompson, the said sum of £21,000 be brought up and accounted for to the estate in a liquidation account to be

forthwith framed; £1000, part of the said £21,000, to be paid to Mr. Thompson forthwith in cash.

"3. That the several liquidation and all other accounts made out up to and including the 31st of December, 1872, relative to the administration of the estate or of the business heretofore carried on in connection therewith, shall be considered finally approved and for ever settled and confirmed by this judgment.

"4. That Miss Letterstedt, within six months from this date, shall come to an arrangement with the executors as to the future conduct of the business undertaking and the control of the property acquired after the death of Mr. Letterstedt.

"5. That, failing such an arrangement, Miss Letterstedt shall either take over the property acquired after the death of Mr. Letterstedt, or shall authorize a sale thereof by the Board of Executors, failing which the Board shall be authorized to make a sale thereof, so that the executors may be placed in a position to carry out Mr. Letterstedt's will, and limit their administration to the property and business authorized by the will.

"6. That the acceptance of the annuity of £100 bequeathed by the testator to the Board of Executors shall not disentitle them to commission and remuneration from and after the 31st of December, 1872, in like manner as if the said bequest had never been made.

"7. That no commission or gross sales be charged since this action or thereafter.

"8. That the defendants pay the costs of this suit."

It appears to their Lordships that when Miss Letterstedt was let into possession of the brewery and distillery under this order, the view of her legal position before stated must have been taken apparently without material doubt or discussion by the parties to the then litigation. The only alternative view is that which was strongly urged at the bar by Sir Horace Davey, viz., that the residuary gift must be construed as a trust bequest, such as is familiar to English lawyers. But under such a trust the tenant for life would not have been let into possession.

In 1878 Miss Letterstedt, on attaining the age of twenty-five years, commenced another action against the executors, in which she sought,—first, an investigation of all the accounts which had

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been rendered by the executors; secondly, the right of conducting the business; and, thirdly, the removal of the Board of Executors on account of misconduct. It is unnecessary to state more of the proceedings and judgment in that action than that on the 11th of July, 1879, judgment was given "that the compromise effected in 1874, in terms of which judgment was given by consent on the 26th of November, 1874, was a final settlement of everything before the 31st of December, 1872, inclusive, and cannot in this action be reopened or set aside."

Miss Letterstedt (then Vicomtesse de Montfort) appealed to Her Majesty in Council against this judgment, and, on the 22nd of March, 1881, this Committee gave judgment that the judgment pronounced on the 11th of July, 1879, was final and conclusive. Other questions were decided which need not be mentioned. Her Majesty, by an Order in Council made on the 14th of April, 1884, ordered and decreed accordingly.

Miss Letterstedt had in 1879 married the Vicomte de Montfort, and has issue now living two children, one born on the 2nd of August, 1881, and the other on the 29th of July, 1882. The present action is brought by the Vicomte de Montfort, as their father and natural guardian, against the Secretary of the Board of Executors, and the matter of complaint in it is substantially the same as the matter of complaint in the action of 1878 for which relief was sought under the first head of relief. The defendant excepted to the declaration upon the ground that the matter complained of was res judicata, and it is stated by Mr. Justice Smith, in his reasons for the judgment of the Supreme Court, that counsel on both sides agreed to treat the exception as a plea, considering it was desirable that the records in the previous suits should be before the Court. The Supreme Court, on the 7th of January, 1886, allowed the plea of res judicata, with costs, and this appeal is from that decision. It appears to their Lordships that the main question is whether the children, on whose behalf the present action is brought, are bound by the compromise which was made in 1874. If they are, it is unnecessary to consider the effect of the judgment in 1879.

The opinion of Voet, referred to by Mr. Justice Smith in his reasons, is that, where the fidei-commissum is conditional, the

fidei-commissary may be bound by a compromise made by the fiduciary, if he acts bonâ fide in respect of a doubtful right (Voet, 2, 15, 8), and the Thesis 516 of Van der Keessel, which was relied upon by the plaintiff's counsel is not opposed to the application of this opinion to the present case. He says that a person who has been prohibited from alienating cannot, it seems, so compromise as to effect an alienation, nor, therefore, can an heir who is burthened with a conditional fidei-commissum do so without the consent of the fidei-commissary. This compromise, by which part of the disputed claim against the Board of Executors upon the accounts is accepted, is not, in their Lordships' opinion, an alienation of property, and the Thesis appears to recognise the power to compromise where there is not an alienation.

Miss Letterstedt, when she attained twenty-five, took the residue of the estate burdened with a fidei-commissum which was conditional upon her having a child or children who should attain twenty-one, or being a female, marry with consent of parents or guardians. Until she attained twenty-five or married, she was the heir by birth, subject to the bequest to herself if and when she should attain that age or marry. It closely resembles a conditional fidei-commissum, and the reasons which Voet gives for the power to compromise are equally applicable to it. In 1874 Miss Letterstedt fully represented the estate. She was the only person who could sue the Board of Executors on behalf of it, and it was uncertain who would become entitled under the fidei-commissum. Their Lordships are not disposed to place any reliance upon the terms of the compromise having been made the judgment of the Court. It cannot be regarded in the same light as a judgment given after a hearing where the Court has had all the facts before it, but still the Court must have considered it to be a compromise which it might sanction.

It was contended by Sir Horace Davey that the compromise cannot bind the unborn children, because the Court made no inquiry and exercised no discretion on that behalf. But that argument is answered by the fact that the gift is made not under English law, but under the law of the Cape of Good Hope, and is by the testator's direction to be construed according to that law

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It does not appear that there is in that law the peculiar practice of the English Court of Chancery, by which it takes on itself the responsibility of judging for those who cannot judge for themselves. On the other hand, by the Cape law the inheritance is represented in circumstances where by English law it would not be represented. In this instance, Miss Letterstedt, the representative of the inheritance, had the same interest as her children in pressing claims against the executors.

For these reasons, their Lordships are of opinion that the minors on whose behalf the plaintiff sues are bound by the compromise, and they will humbly advise Her Majesty to affirm the decree of the Supreme Court, and to dismiss the appeal. The appellant will pay the costs of it.

Solicitors for appellant: *Venning, Sons, & Manning.*
Solicitors for respondent: *Flux, Son, & Co.*

[PRIVY COUNCIL.]

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COSSMAN . . . . . PLAINTIFF;

AND

WEST . . . . . DEFENDANT.

AND

COSSMAN . . . . . PLAINTIFF;

AND

BRITISH AMERICA ASSURANCE COMPANY . . . . . } DEFENDANT.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Actual total Loss—Sale of Ship by Court—Sale Proceeds less than Salvage Remuneration—Derelict.

To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under

* *Present*:—LORD BRAMWELL, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated.

Where a ship had been deserted by her master and crew, having been previously placed by them in a sinking condition, but had been subsequently taken possession of by salvors, towed into port, and there sold together with the cargo, by order of the Admiralty Court, for less than the actual cost of the salvage services:—

Held, in actions upon policies on the ship and freight respectively, that, assuming the possession by salvors of a derelict vessel to be only a constructive total loss, the subsequent sale constituted an actual total loss of both ship and cargo.

CONSOLIDATED appeals from two decrees of the Supreme Court (Aug. 4, 1885) reversing verdicts for the appellant which had been entered by the Chief Justice upon the trial of the actions on the 20th and 21st of November, 1884.

The actions were brought by the appellant on two policies of insurance, one a time policy on the hull of the barque *L. E. Cann*, for $4000 in all, but underwritten by the respondent West for $100, and the other a voyage policy on freight of the same ship for $3000, issued by the British America Assurance Company.

The declarations were in the usual form, alleging a total loss by the perils insured against of the ship in the one case, and of the freight and cargo in the other.

A number of pleas were pleaded, but the main defences relied upon were substantially the same in both actions, viz.:—

(*a.*) That there was no total loss, either actual or constructive.

(*b.*) That there was no abandonment or notice thereof.

(*c.*) That there was no preliminary proof of the loss, as provided by the conditions of the policies.

The Chief Justice, before whom the actions were tried, was in favour of the appellant in both actions, holding that there was an actual total loss of the ship, cargo, and freight, and that no notice of abandonment was necessary, and that sufficient preliminary proof of loss had been given; and he entered the verdict with costs for the appellant for $114 in the one action, and $3295 in the other, including interest.

The Supreme Court, by a majority of three judges to one, held that the loss was a constructive total loss only, and that no notice of abandonment had been given, and also that no sufficient preliminary proof of loss had been given.

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The facts are stated in the judgment of their Lordships.

Romer, Q.C., and *Bray*, for the appellant, contended that there had been an actual total loss both of the vessel and freight. The ship was wrecked and deserted, that is abandoned, and became by the perils insured against transferred to the insurers. Though afterwards salved and brought into port it never again came into the possession of the owners. The possession by the salvors was from the first adverse, and not as in ordinary cases permissive, or subject to the control of the master. There was no chance of recovery from the salvors, except by paying more than the ship was worth to get rid of their lien. Assuming that there had been a chance of recovery, and that in respect thereof notice of abandonment was necessary, still that chance was taken away by the subsequent sale, which the owners were powerless to prevent except by doing that which no prudent uninsured owner would have done. It was sold by decree of a competent Court, and fetched a price less than the amount of salvage remuneration for which it was liable. There was, therefore, nothing further left for the owner to abandon; all right to take steps to obtain repossession, whether by insured or insurers, was taken away by the decree of the Court. For a definition of actual total loss see Phillips on Marine Insurance (5th ed.), sects. 1485–1487, and sect. 1491, note, and Arnould's Insurance (5th ed.), vol. ii., p. 948, where instances are given by way of illustration without definition. Reference was also made to *Cambridge* v. *Anderton* (1), where there is a definition by Lord Tenterden, and to the report of a motion for a new trial therein (2); *Read* v. *Bonham* (3), referred to in Bayley, J.'s, judgment in the last case: *Farnworth* v. *Hyde* (4); *Mullett* v. *Shedden* (5); *Roux* v. *Salvador* (6), where there is a definition by Lord Abinger; *Stringer* v. *English and Scottish Marine Insurance Company* (7). Two cases relied upon against the appellant were *Thornely* v. *Hebson* (8) and *Kaltenbach* v.

(1) 1 Ry. & Mood. 60.
(2) 2 B. & C. 691.
(3) 3 B. & B. 147.
(4) 18 C. B. (N.S.) 835; S. C. Law Rep. 2 C. P. 204.
(5) 13 East, 304.
(6) 3 Bing. N. C. 266, 278, 279.
(7) Law Rep. 4 Q. B. 676; Law Rep. 5 Q. B. 599.
(8) 2 B. & A. 513.

Mackenzie (1). [LORD BRAMWELL:—So much as regards the ship, now as to the freight.] The appellant is still stronger as to that. Through the fraudulent conduct of the master (insured against) a large part of the cargo had never been shipped; the remainder was salved, arrested, and sold, and the freight was totally lost. Reference was made to *Rankin* v. *Potter* (2); *Levy & Co.* v. *Merchants Marine Insurance Company* (3); Parsons on Insurance, vol. ii., p. 477.

Graham, Q.C. (of the Canadian Bar), and *Jeune*, for the respondents, contended that the evidence failed to establish that there was an actual total loss either in respect of the sale by the Court, or irrespective of the sale. The ship never ceased to exist as a ship. It was repairable and in safety in port. Consequently there could be nothing more than a constructive total loss, and the insurers were entitled to rely on the absence of any notice of abandonment. Further, if a total loss, it had not been occasioned by a peril insured against. The proximate cause of the loss was the sale, which was only a remote consequence of the barratry of the master, the latter being the peril insured against. The sale could have been prevented by reasonable exertions on the part of the insured, which in his default the insurers ought to have had an opportunity of making. Reference was made to Mr. Justice Blackburn's judgment in *Rankin* v. *Potter* (4); *De Mattos* v. *Saunders* (5); *Cory* v. *Burr* (6). There is a distinction between a sale after capture and a sale such as in this case. Capture is insured against. Condemnation follows capture and the whole intention of the proceeding is to change the property. Reference was made to 2 Arnould's Insurance (6th ed.), p. 727; *Stringer* v. *English and Scottish Marine Insurance Company* (7); *Ionides* v. *Pacific Fire and Marine Insurance Company* (8). The cases cited on the other side relate to justifiable sale by the master abroad under stringent necessity, it being impossible to do anything else. But where the owner had heard of a justifiable sale

(1) 3 C. P. D. 467.
(2) Law Rep. 6 H. L. 82.
(3) 52 L. T. (N.S.) 263.
(4) Law Rep. 6 H. L. 116.
(5) Law Rep. 7 C. P. 570.
(6) 8 App. Cas. 393, 398, 399, 404, 406.
(7) Law Rep. 5 Q. B. 599.
(8) Law Rep. 6 Q. B. 674.

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before it took place he could not recover without notice of abandonment: see *Kaltenbach* v. *Mackenzie* (1). Then as regards an actual total loss irrespective of the sale, there was not on the evidence even a constructive total loss. A ship may be in that condition that it would cost three times as much to repair as she would be worth when repaired, still that is not actual total loss and she must be abandoned to the insurers. A ship physically irreparable is actually lost, a ship which is only commercially irreparable as above is constructively lost. Reference was made to *Rankin* v. *Potter* (2); *Shepherd* v. *Henderson* (3); *Tunno* v. *Edwards* (4); *Martin* v. *Crokatt* (5); *Fleming* v. *Smith* (6). As to the notice of abandonment and the necessity of alleging it, see *Currie & Co.* v. *Bombay Native Insurance Company* (7); *Thelluson* v. *Fletcher* (8). Reference was also made to *Dalzell* v. *Mair* (9).

If there was only a partial loss, plaintiff should have given figures and proof six days before he claimed. As regards the freight, the contract in respect thereof was fraudulent, there never was any valid contract of affreightment and never any freight at risk under this policy. There was only one contract by the master in this matter and the whole was ratified by the owner with all its illegality. The plaintiff cannot say that there were two contracts and that he only ratified one. Reference was made to Story on Agency, sect. 267.

Bray, replied.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

These are consolidated appeals from two judgments of the Supreme Court of Nova Scotia in actions in which the appellant was the plaintiff. The action against West was upon a time policy of insurance of the Ocean Marine Assurance Association,

(1) 3 C. P. D. 467.
(2) Law Rep. 6 H. L. 82–166.
(3) 7 App. Cas. 49, 59, 70.
(4) 12 East, 488.
(5) 14 East, 465.
(6) 1 H. L. C. 513, 534.
(7) Law Rep. 3 P. C. 79.
(8) 1 Esp. 72.
(9) 1 Camp. 532.

dated the 28th of November, 1881, for $4000, upon the barque *L. E. Cann*, a British ship, valued at $10,000, from the 28th of November, 1881, to the 28th of November, 1882. The perils insured against were, amongst others, perils of the seas, barratry of the master (unless in case of loss on goods or specie when the master is the consignee or supercargo thereof), and of mariners, and all other perils, losses, or misfortunes that should come to the hurt, detriment, or damage of the said vessel, or any part thereof, subject to the conditions and provisions contained in or referred to by clauses in the policy, none of which affect the present case. It was stipulated that no particular average or partial loss, unless in case of general average, was to be paid unless the same should amount to five per cent., &c. The policy was underwritten for $100, by West, the defendant in the suit, who was a member of the Ocean Marine Insurance Association, and is the respondent in the first appeal.

The policy on freight was effected by the plaintiff, appellant, on the 31st of January, 1882, and was for $3000, on freight at and from Mexico to New York upon all kinds of lawful goods and merchandise laden or to be laden on board the said barque *L. E. Cann*. The policy contained the following words,—"the said goods and merchandise hereby insured are valued at $6000." Their Lordships understand this policy to be a policy on freight of goods laden or to be laden valued at $6000. The perils insured against, so far as this case is concerned, may be treated as substantially the same as those in the other policy. The policy was effected with the British America Assurance Company, the defendants in the second action and the respondents in the second appeal.

In the policy on the barque it was provided that all losses and damage which should happen to the vessel should be paid within sixty days after proof made and exhibited of such at the office of the association. In the policy on freight it was stipulated that all losses and damages which should happen should be adjusted in accordance with English practice and usage at Lloyd's, and should be paid within sixty days after proof of loss and adjustment and proof of interest in the said freight.

Each of the policies was effected in the name of the plaintiff,

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and was stated to be on behalf of whom it may concern; and in the policy on freight it was added, "In case of loss to be paid to him," i.e., to the plaintiff. In neither policy was there any exemption of liability on the part of the insurers on account of charges, if any, which might be incurred for salvage.

A charterparty, dated the 6th of January, 1882, expressed to be made between Brooks, master of the British barque *L. E. Cann*, then lying in the harbour of Vera Cruz, of the first part, and Mr. Antonio Granes of the second part, was put in evidence in the second action. By that charterparty the said master agreed to the freighting and chartering of the whole of the said vessel, with the exception of the cabin and necessary room for the crew, and storage for provisions, sails, and cables, unto Granes for the voyage from Vera Cruz and Tucolota to New York, and it was agreed that the vessel should load at Vera Cruz one part of the cargo, and after signing bills of lading should proceed to Tucolota for loading the balance of the cargo, and thence to New York. Granes engaged to furnish a cargo of assorted produce, the charterer to have the privilege of loading cargo for other parties, and captain to sign bills of lading for same without prejudice to the charter, and Granes was to pay for the use of the vessel during the voyage the lump sum of $6000, payable at New York in the United States currency or gold, to advance sufficient money to the master at current rate on New York for ship's ordinary disbursements, that amount to be insured by charterer's agents at owner's risk, and to be deducted from the freight with insurance and five per cent. commission.

The plaintiff claimed for a total loss in each case.

The pleas set up several defences. The most material of them were, that there was not a total loss; that no proof, or no sufficient proof, of the loss was made before action brought; that there was concealment of material facts as to the condition of the vessel, and that the respondent was induced to subscribe the policy by the fraud of the appellant. In the action on the policy there was also a denial of interest as alleged. The following facts appeared in the evidence:—

In November, 1881, the *L. E. Cann* was at Vera Cruz. Her captain was W. W. Brooks, who had commanded her since 1879

or 1880, and who had acquired a one-sixteenth share in her from the appellant, the bill of sale being made to Ephraim Brooks, an uncle of W. W. Brooks. The interest of W. W. Brooks in the *L. E. Cann* was always kept insured by him, and in February, 1882, he wrote to his agents desiring that his interest in freight should also be insured for $500. This was, however, not done, because the insurance on freight was ordered early in 1882 by the appellant for Brooks' interest as well as his own. At Vera Cruz W. W. Brooks, as he himself gave evidence at the trial, made an arrangement with a Spaniard named Campos, who transacted the business of the vessel, that Campos should ship a bogus or sham cargo, and that Brooks should make away with the vessel. Accordingly a cargo was shipped worth only 40 per cent. of that represented by the bills of lading, and a draft for $1709. 40*c.* was given by a man named Villa, with Campos' knowledge, to Edmund Miller, Brooks' father-in-law, for him, the arrangement being that Brooks was to receive $2000 at Vera Cruz on signing bills of lading, $2000 on signing bills of lading at Tucolota in Mexico, and $2000 more when the protest was presented. Granes was a party to these proceedings, and went with the *L. E. Cann* to Tucolota, which place the *L. E. Cann* reached from Vera Cruz in January, and at Tucolota gave Brooks a further draft for $2000 in favour of Edmund Miller, and put on board further cargo of much less value than appeared on the bills of lading. On the 30th of March, 1882, the *L. E. Cann* left Tucolota, and on the 27th of April, 1882, in the Gulf Stream, Brooks having previously signalled a passing schooner, the *George W. Lockner*, went on board of her with all his crew, deserting the *L. E. Cann*, and proceeded in the *George W. Lockner* to Philadelphia, where they arrived on the 4th of May. The *L. E. Cann* was, when deserted by her crew, rapidly filling with water. There can be no doubt that this was mainly caused by about fifteen auger holes having been bored in her on both sides and the ceiling cut away over the auger holes. The *L. E. Cann* did not, however, sink, and on the 24th of May she was found by the *Resolute*, belonging to the Baker's Salvage Company, and was, with the help of the *North America*, a vessel belonging to the Insurance Company of North America, towed to Lynnhaven Bay.

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The Baker's Salvage Company afterwards took her to the Port of Norfolk. On examination of the vessel there the auger holes and the cutting away of the ceiling above mentioned was discovered. In August, 1882, the vessel was hauled up on the ways at Grave's ship-yard at Norfolk. She was then (subject to the damage she had sustained in several respects from the storms) found to be sound. A suit for salvage was brought by the Baker's Salvage Company in the District Court of the United States for the Eastern District of Virginia (the Insurance Company of North America having waived their claim for salvage), and under orders of the Court in July and August, 1882, the *L. E. Cann* and cargo were sold, producing $3183 net, and the said proceeds were paid to the Baker's Salvage Company, it being stated in the later order that it appeared to the Court that the actual cost of the salvage service amounted to at least $5000. The vessel was subsequently repaired and put into good condition.

The actions were both tried before the Chief Justice of the Supreme Court, who gave a verdict for the plaintiff without stating any reasons. In *Cossman* v. *West* he said, "I think the plaintiff has made out a case entitling him to judgment; I find there is a total loss by the perils insured against under the policy, and assess the damages at $100, with interest, $14; total $114, for which judgment will be entered"; and judgment was entered accordingly.

In the action on the policy on freight the Chief Justice said, "The plaintiff has made out a case entitling him to recover for a total loss of freight under the policy declared upon. I find a judgment therefore for the plaintiff, and assess damages at $3000, with interest, $295; total $3295, for which judgment will be entered." Judgment was entered accordingly.

It should be mentioned that the plaintiff was wholly exonerated from any participation in or knowledge of the disgraceful fraud on the part of Brooks, the master. Indeed, the Chief Justice stated that the villainous conduct of the master could not affect the owner, who is admittedly innocent of any collusion with his rascality.

A motion was made to the Full Court to set aside the verdicts and judgments. After argument, the learned judges were

divided in opinion, the majority holding that, as no notice of abandonment had been given, there was only a partial loss, and in each case the finding and judgment of the Chief Justice was set aside and reversed, and judgment entered for the Defendants with costs, including the costs of the trial and the costs of the appeal. The Chief Justice adhered to his original opinion, and held that there was an actual total loss both of the ship and of the freight.

The present appeals have been preferred against the decrees founded upon the judgments of the majority of the judges. The principal questions in each case are, whether there was an actual total loss, and whether sufficient preliminary proof of loss was given.

There seems to be no doubt that, after the abandonment of the barque by the master and crew, and when the owner first received notice thereof, the vessel was in such a hopeless condition that the risk and expenses of endeavouring to save her were such that no prudent uninsured owner would have incurred them. There was, consequently, a constructive total loss, and the plaintiff might, when he first received notice of the loss, or within a reasonable time afterwards, have given notice of abandonment to the underwriters, in which case he could have recovered for a total loss. It was admitted that no formal notice of abandonment was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owner and the underwriters substantially amounted to such a notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss. By that sale, the property in the vessel and cargo was transferred to the purchaser, and the vessel and cargo ceased to be the property of and were wholly lost to the original owners thereof. To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed; it may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid

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and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated: *Mullett* v. *Shed-don* (1). In that case saltpetre, which had been insured, was seized in the course of the voyage, and condemned. It was thereupon taken out of the ship and sold under a decree of condemnation for the benefit of the captors. The sentence of condemnation was afterwards reversed on appeal, and the property ordered to be restored, or its value paid, for the use of the owner on payment of the expenses, on behalf of the captor and of His Majesty in the office of Admiralty in both Courts. It was held that the assured might recover as for a total loss, without notice of abandonment. In the course of the argument Lord Ellenborough remarked, "The assured stands upon the actual destruction as to him of the thing insured, which precludes the necessity of any notice to abandon it;" and Bayley, J., "No circumstance has happened since the seizure to make the original detention less than a total loss." In delivering judgment Lord Ellenborough, C.J., said:—

"Then, as to the point of abandonment, if instead of the saltpetre having been taken out of the ship and sold, and the property devested, and the subject matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument, that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away."

The case of *Stringer* v. *English and Scottish Marine Insurance Company, Limited* (2) was referred to by the learned Chief Justice in the Court below. In that case goods were insured on a voyage against, amongst other perils, "takings at sea, arrests, restraints, and detainment of all kings, &c." While on the voyage, the ship and cargo were seized by an American cruiser and taken to New Orleans, where a suit was instituted by the captors against

(1) 13 East, 304. (2) Law Rep. 4 Q. B. 676.

the ship and cargo for the purpose of having them adjudged a lawful prize. The owners at that time elected to treat the seizure as a partial loss. On the 16th of June, 1864, the Prize Court gave judgment against the captors, and ordered restitution. On the 1st of July the captors appealed. On the 12th of September the owners, who then for the first time knew that an appeal had been preferred, gave notice of abandonment, which the underwriters refused to accept. Subsequently, the owner informed the underwriters that the Prize Commissioner had offered to the Court to sell the ship and cargo. The sale of the goods could have been prevented by depositing the full value of the goods, or giving bail for them in the Prize Court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The plaintiffs and defendants declined to take either of these steps, and on the 25th of May, 1865, the ship and cargo were sold by order of the Court.

It was held by the Court of Queen's Bench that the prolongation of the litigation by the captors appealing was not more than might have been reasonably anticipated when the ship and cargo were first libelled; that the appeal did not amount to such a change of facts as would justify the assured in changing their election, and that the assured could not, by their notice of abandonment, make the loss by the seizure and detention a total loss. But it was further held that the depositing of the full value of the goods in paper currency or the giving of bail for them were acts which a prudent uninsured owner would not have adopted to prevent a sale, and that the sale, therefore, occasioned by the seizure, caused a total loss, for which the plaintiffs were entitled to recover.

In delivering the judgment of the Court, Lord Blackburn, then Mr. Justice Blackburn, gave a clear and comprehensive view of the law. Speaking of the time when the cargo was detained under the seizure and the suit instituted in the Prize Court to have it condemned, he said (p. 687), "It is clear that at this time the cargo was, by one of the perils insured against, entirely out of the control of the assured under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what

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period. Under such circumstances the assured had a right to elect whether he would retain the property in himself and treat the loss as a partial one or abandon it to the underwriters and claim for a total loss." Having then proceeded to discuss the question whether a notice of abandonment had been given in time, and held that it had not, he went on to say (p. 690): "But we think the sale by the Prize Court stands on a very different footing. If the Prize Court in America had wrongfully condemned the goods and they had been sold under that sentence, the case would have been identical with that of *Mullett* v. *Shedden* (1), where the very point decided was that by the sale the property was wholly lost to the owner, and therefore that 'the necessity of any abandonment was altogether done away.'" Again, he says: "But in the present case the sale was not under a condemnation, but because the assured did not give security to prevent the sale. The defendants (the underwriters) had the fullest notice of what was about to happen, and had ample opportunity to interfere and give security to prevent the sale; still the assured, if he by any means such as he could reasonably be expected to use could have prevented the sale, was bound to use them, and if the sale was directly occasioned by his default, though remotely by the seizure, he cannot recover against the underwriters on account of that sale. But the assured was not bound to use unreasonable exertions in order to preserve the thing insured, and if the giving of bail or deposit would have exposed them to expense, or risk of expense, beyond the value of the object, or, as the same idea is often expressed, if the steps necessary to prevent the sale were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure." Having then examined the evidence, his Lordship concluded (p. 692): "We come, therefore, to the conclusion of fact that the assured could not, by any means which they could reasonably be called on to adopt, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon their insurers for a total loss. Even then the assured were not bound to do so. If they had

(1) 13 East, 304.

thought it was more for their interest still to claim the proceeds of the sale in the hands of the American Court as their money, and come upon the underwriters only for the partial loss, they might do so. It is clear as a matter of fact that they elected to come upon the insurers for an indemnity for a total loss, and that by so doing the insurers, when they have indemnified them, will be entitled to be subrogated for them and to get what they can out of the hands of the Americans for their own benefit." His Lordship then cited authorities in support of that right on the part of the insurers.

The case was carried to the Exchequer Chamber by writ of error on a special case, and the judgment was affirmed (1). Chief Baron Kelly, in delivering his judgment, stated that, in his opinion, the Court of Queen's Bench were not only perfectly justified in coming to the conclusion, but that they could not have come to any other conclusion than that no prudent owner would have given the security necessary to prevent the sale. He then proceeded (p. 603):—"Such being the circumstances of the case, the decree for sale and the sale itself having taken place under circumstances in which there was no default on the part of the owner of the goods, we have to consider whether that sale justified the Plaintiffs in treating the case as one of total loss. I am of opinion that the decree for the sale of the goods, and the sale of the goods under that decree, which for ever took out of the possession of the owner the goods themselves, and took away from him the power of ever repossessing himself of the goods in specie, entitled the plaintiff to treat the case as one of total loss. This loss of the goods arises, though not directly, out of the original capture (which was of itself, if so treated, a total loss), through a series of consequences, viz., the institution, the different steps, and the continuance of the suit until the decree was pronounced. The sale was, if I may use the expression, a completion of the total loss."

Mr. Baron Martin observed:—"When the sale took place, the property in the goods was taken out of the owner, so that it became impossible for him to take the goods under his original ownership to the port of discharge, and upon that taking place

(1) Law Rep. 5 Q. B. 599.

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the goods I will not say were totally lost, because I have complained of that being an ambiguous expression, but were taken entirely out of the owner's dominion and control, and were absolutely taken away from him, and, in my judgment, after that event took place, the word 'abandonment,' in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all. The consequence was that there was, in my judgment, a total deprivation of the ownership of the goods in the assured for the purpose of the adventure, and that he was, therefore, entitled to the whole value of his goods under the valued policy."

In *Holdsworth* v. *Wise* (1) and *Parry* v. *Aberdein* (2) there was an abandonment, and it was held that the subsequent recovery of the vessel did not convert that which had become a total loss by reason of a notice of abandonment into a partial loss. In *Roux* v. *Salvador* (3) it was held by the Court of Exchequer Chamber that, where goods were so injured by the perils of the sea that they would have been destroyed by putrefaction before they could arrive at their destination, and were consequently sold, the assured was at liberty to treat the loss as a total loss, without giving notice of abandonment. In that case, which is a leading one, Lord Abinger, in a very lucid and learned judgment, pointed out the distinction between a total and a partial loss; and gave a clear and exhaustive exposition of the law, and laid down the principles upon which the whole doctrine of abandonment in our law was founded, and the consequences resulting from it. He said, "It is indeed satisfactory to know that however the laws of foreign States may differ from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment. The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or if it be placed by reason of the perils against which he insures in such a position that it is wholly out of the power of the assured or of

(1) 7 B. & C. 794. (2) 9 B. & C. 411.
(3) 3 Bing. (N.C.) 267.

the underwriter to procure its arrival, he is bound by the letter of his contract to pay the sum insured" (1). His Lordship then went on and pointed out intermediate cases, in which notice of abandonment would be necessary before the assured could treat the loss as a total one. Elsewhere in dealing with the case then before the Court, His Lordship said (2), "In the case before us the jury have found that the hides were so far damaged by perils of the sea that they never could have arrived in the form of hides. By the process of putrefaction and fermentation which had commenced a total destruction of them before their arrival at the port of destination became as inevitable as if they had been consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive loss, but of an absolute total loss of the goods. They never could arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end." Again (p. 287), on referring to *Mellish and Andrews* (3), he said, "In the language of Lord Ellenborough, it is an established and familiar rule of insurance that when the thing insured exists in specie and there is a chance of its recovery there must be an abandonment; a party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is, in fact, an average or a total loss, as the case may be." Then, referring to *Mullett* v. *Sheddon* (4) he says, "In that case the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured."

Again, his Lordship proceeds, "Both these cases are direct authorities that no abandonment is necessary when there is a

(1) Page 285.
(2) Page 281.
(3) 15 East, 13.
(4) 13 East, 304.

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total loss of the subject-matter insured, to which may be added the cases of *Green* v. *Royal Exchange Assurance Company* (1), *Idle* v. *Royal Exchange Assurance Company* (2), *Robertson* v. *Clarke* (3), and *Cambridge* v. *Anderton* (4). This last is on all fours with the present, and is an express decision that when the subject-matter insured has, by a peril of the sea, lost its form and species, where a ship, for instance, has become a wreck or a mere congeries of planks, and has been bonâ fide sold in that state for a sum of money, the assured may recover for a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of a jury is justified by necessity and a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss, and if there be an insurance the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss, It may be proper to remark, however, that the assured may preclude himself from recovering for a total loss if, by any view to his own interest, he voluntarily does or permits to be done any act whereby the interests of the underwriter may be prejudiced in the recovery of that money."

Nothing can be clearer than the doctrine thus enunciated. It has been always acted upon, and was followed in *Farnworth* v. *Hyde* (5), and in many other cases. The last-mentioned case was overruled in the Exchequer Chamber (6), but merely upon a question of fact. The principle of law was not impugned. On the question as to the necessity of notice of abandonment, the Court of Exchequer Chamber expressly stated that they left the authority of the decision of the Court below untouched, neither confirmed nor weakened (7). It would be impossible to comment upon all the cases which were referred to in the course of the argument before their Lordships. Many of them were wholly inapplicable to the present case. For instance, *Cory* v. *Burr* (8), in which, in consequence of the barratrous act of the master, the ship was seized, it was held that the seizure and not the act of

(1) 6 Taunt. 68.
(2) 8 Taunt. 755.
(3) 1 Bing. 445.
(4) 1 Ry. & Mood. 60; S.C. 2 B. & C. 691.
(5) 18 C. B. (N.S.) 835.
(6) Law Rep. 2 C. P. 204.
(7) Law Rep. 2 C. P. 226, 227.
(8) 8 App. Cas. 393.

smuggling was the cause of the damage, and that as "seizure" was excepted from the perils insured against, the insurer could not recover against the underwriters. In that case the barratrous act of the master in taking the goods on board would not have caused any loss or damage if the vessel had not been seized, but as seizure was excepted from the perils, there was no loss by a peril insured against. If in the present case the policy had excepted all charges, if any, which may be incurred for salvage (an improbable exception, no doubt), the case would have had a bearing upon the present; but there was no such exception, and consequently no similarity between the two cases.

The cases above referred to of *Roux* v. *Salvador* (1) and *Stringer* v. *English and Scottish Insurance Company* (2) are decisive upon the present case, unless a valid distinction can be drawn between a sale upon capture and the sale under the decree of the Court of Admiralty for the expenses of salvage services.

Two cases were cited to shew that there is such a distinction; *Thornely* v. *Hebson* (3), referred to by Mr. Justice Thompson in the Court below, and *De Mattos* v. *Saunders* (4).

In *Thornely* v. *Hebson* (3), it was held, under the particular facts of the case, that the sale of a ship under a decree of a foreign Admiralty Court for salvage did not constitute a total loss. In that case, however, it appeared that the value of the vessel, even under a forced sale, exceeded the amount of the claim of the salvors, and that the owners were near enough to have acted in the business, and that it was not proved that they had used all the means in their power to prevent the sale. It is to be inferred from what fell from the learned judges that if they had done so and were not in default in not preventing the sale they might have recovered for a total loss. Abbott, C.J., said, "If, in this case, it had appeared that the owners had used all the means in their power and were unable to have paid this salvage it would have been very different; but that is not so." So Bayley, J.,—"Where a ship is captured she is taken possession of by persons adversely to the owner, and so it is in the case

(1) 3 Bing. N. C. 267.
(2) Law Rep. 5 Q. B. 599.
(3) 2 B. & A. 513.
(4) Law Rep. 7 C. P. 570.

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of barratry, but here the ship was taken possession of by persons acting *not adversely* but for the joint benefit of the owners, and the latter were never dispossessed of the vessel."

In that case it appears that the crew of the *William* were on board the *Hyder Ali*, from which the volunteer salvors were permitted to go on board the vessel which was saved by their exertions. The vessel, although the crew had left her, could not be treated as a "derelict" and out of the possession and control of the master, so long as he was keeping by her in the *Hyder Ali*.

In another part of his judgment Mr. Justice Bayley says, "The sale (that is, the sale under the decree for salvage) in order to constitute a total loss, must have been found to have been necessary and wholly without the fault of the owners. Now, here a ship originally worth £1200 is sold for £315 only. It appears that the owners were near enough to have acted in the business at the time."

Mr. Justice Holroyd also considered that the taking possession by the salvors was not adverse, but an act done for the benefit of the owners, and therefore did not dispossess them; that the custody of the vessel was in the salvors till the salvage was paid, but that the legal possession was still in the owners. His Lordship added, "I also think that the sale will not amount to a total loss if it was in the power of the owners to prevent it, and it lies upon them to shew that they could not do so."

In referring to this case in the case of *Stringer* v. *English and Scottish Marine Insurance Company* (1), Mr. Baron Martin says, "Holroyd, J., pointed out, as indeed did all the judges, that to hold that to be a total loss would be holding that which was really a partial loss to be a total loss, because the assured had not taken a step to prevent the sale which he ought to have taken."

The present case differs materially from *Thornely* v. *Hebson* (2) for here the salvage greatly exceeded the value of the property saved, and no prudent uninsured owner would have paid the salvage in order to redeem the ship. Besides, the proceedings in the Admiralty Court were against the ship, which was within its jurisdiction, the plaintiff, the owner, was not, as in *Thornely*

(1) Law Rep. 5 Q. B. 607. (2) 2 B. & A. 513.

v. *Hebson* (1), near enough to have acted. He was in Nova Scotia, and the ship was at Norfolk and the Admiralty Court in Virginia, and it did not even appear that he had notice of the proceedings in the Admiralty Court. He was not bound to follow his ship in its then state in the hands of the salvors wherever they might please to take it. Certainly the owner of the ship was not bound to redeem the cargo which did not belong to him, in order that he might have a chance, a very remote one, that he might be able to send it to its destination by another vessel. Furthermore, the insurers, by their agents, were present at Norfolk, they had notice of all the proceedings, and the Ocean Insurance Company, the insurers of the ship, had informed the owner in their letter of the 8th June, 1882, that they had sent their marine inspector to look into the matter and report, and they did not report before the sale of the ship. They might (as stated by Mr. Justice Blackburn, in *Stringer's Case* (2), above referred to), if they had pleased, have redeemed the ship and cargo. For the reasons above advanced it appears clear that the owner was not in default in not preventing the sale of the ship and cargo by giving bail, or paying the salvage expenses.

In *De Mattos* v. *Saunders* (3) it was held that a partial loss of cargo caused by perils of the sea was not converted into a total loss by a sale under a decree of a Court of Admiralty in a suit instituted by salvors against the ship and cargo for the recovery of sums claimed for salvage services. The case was decided upon the ground that the acts and proceedings in the Admiralty Court were not, under the circumstances in that case, the natural consequence of a peril insured against. The late Mr. Justice Willes, in delivering the judgment of the Court, observed, "The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors and the seizure and sale under the orders of the Court of Admiralty must fail, because those acts and proceedings were not the natural and necessary consequence of a peril insured against. The assured is entitled to recover from the underwriters for a loss arising from sea damage and its proximate consequences; but it is not a

(1) 2 B. & A. 513.
(2) Law Rep. 4 Q. B. 679.
(3) Law Rep. 7 C. P. 570.

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proximate consequence of sea damage in general that there should be proceedings in a Court of Admiralty. A link is wanting. As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss, which would be absurd. There was no natural connection between the sea damage here and the sale under the decree of the Court of Admiralty. The cases cited of hostile seizure and condemnation by a Prize Court have no application. In such a case, the original seizure is primâ facie a total loss; all that follows is only the necessary consequence of the seizure. It appears from the case that there was a considerable partial loss of the salt occasioned by perils of the sea. For the purposes of this cause we may call it either a total loss of part or a partial loss of the whole cargo; but whatever it is called it is not a loss within the policy so long as any substantial part of the salt remains, because of the memorandum whereby salt is warranted free from average, unless general, or the ship be stranded."

But the present case goes further than a claim for salvage, where a ship has not been abandoned at sea. In this case the vessel had been abandoned by the master and the crew when she was discovered and taken possession of by the salvors.

Their Lordships are of opinion that this case is distinguished from that of *De Mattos* v. *Saunders* (1). The passage above quoted shews that at the time when the salvage service was commenced in that case, there was not any loss for which the insurers were liable under the terms of the policy. In that case also the vessel does not appear to have been abandoned by the master and crew, whereas in this case the vessel was a derelict. There can be no doubt that the barque was at that time, in the eye of the law, a "derelict," a term legally applied to a ship which is abandoned and deserted at sea by the master and crew without any intention on their part of returning to her. It is not like the case of a vessel which is left by her master and crew temporarily with the distinct intention of returning to it. In such a case the ship is not abandoned, and therefore is not derelict, though the master may have given up the entire management to the salvors.

(1) Law Rep. 7 C. P. 570.

In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and crew. In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence ; but in an ordinary case of disaster, when the master remains in command he retains the possession of the ship, and it is his province to determine the amount of assistance that is necessary, and the first salvors have no right to prevent other persons from rendering assistance if the master wishes such aid. So unless a vessel is derelict the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him.

In the present case, the vessel being a derelict, the salvors had the exclusive possession and control of it up to the time of the sale, and were not bound to give it up until they had been remunerated for the salvage services. Assuming that their possession constituted a constructive total loss, but not an absolute total loss, and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the Court removed, as Lord Abinger remarked in *Roux* v. *Salvador* (1), all speculation upon that subject, and entitled the plaintiff to treat the case as one of total loss without abandonment. As to the freight, the sale of the cargo clearly constituted a total loss, for after the sale the assured and underwriters in his place lost the right to carry on the cargo.

The salvage services, if not a peril insured against, were an immediate and necessary consequence of a peril insured against, whether of barratry or a peril of the sea; the immediate consequence was that the ship was rendered liable for the salvage expenses and the proceedings in the Admiralty Court, the immediate and necessary consequence of the damages remaining unpaid.

(1) 8 App. Cas. 303.

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It was urged at the bar that there was no valid or legal charterparty or contract for freight in consequence of the fraudulent arrangement made by Brooks, the master of the vessel, but this contention cannot be supported. There were two contracts, one the charterparty of the 6th of January, 1882, made by the master on the part of the owner of the vessel, the other the fraudulent agreement on the part of the master on his own account to accept a bogus cargo, and to make away with the vessel. The latter did not vitiate the former, which might have been enforced if the master had refused or neglected to cause the loss of the ship.

Their Lordships concur with the Chief Justice that the defendants cannot rely upon want of preliminary proof of loss. It was only the fact of the loss of which preliminary proof had to be given. The production of the master and mate could not be legally insisted upon by the insurers, and, in West's case, they asked for nothing more. In the suit upon the policy on freight there was, in addition to the facts relied upon by the Chief Justice, the declaration of the owner of the 14th of February, 1883.

In the fourth plea and in the grounds of appeal in the action on the ship policy the defendants relied upon want of preliminary proof of interest, as well as of loss, but the policy on the ship did not provide for preliminary proof of interest. In the action on the policy on freight, though the policy required preliminary proof of interest, the third plea relied only upon the absence of proof of loss. Their Lordships are of opinion that the absence of preliminary proof of interest cannot avail either of the respondents. The defendants must also fail upon their defence founded upon the alleged fraudulent concealment that at the time of the insurance the ship was worm-eaten, unsound, and unfitted for the voyage. In the respondent's own case it is stated that when the vessel was hauled up at Norfolk she was then, subject to the damage she had in several respects sustained from the storms, found to be sound. The defendants, in their Lordships' opinion, must also fail on the defence that the plaintiff was not interested as alleged.

Upon the whole their Lordships are of opinion that the judg-

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ments and orders of the Full Bench, dated the 4th of August, 1885, ought to be reversed, and that the original judgments and decrees of the 6th of December, 1884, respectively ought to be affirmed, and that the defendants in each of the actions ought to pay the costs incurred in the Full Bench, and they will humbly advise Her Majesty accordingly.

The respondents must respectively pay the costs of the appeals to Her Majesty in Council.

Solicitors for appellant: *Hill, Son, & Rickards.*
Solicitors for respondents: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

TEARLE . . . . . DEFENDANT;

AND

EDOLS . . . . . PLAINTIFF.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown Lands Act, 1884, *s.* 4, *and s.* 21, *sub-s.* 3—*Conditional Purchase forfeited—Crown Lands.*

The defendant having applied for a grant, partly on conditional purchase and partly on conditional lease, of land within the external boundaries of the plaintiff's leasehold area, as determined by the Minister of Lands, under the Crown Lands Act of 1884, it appeared that the said portions had prior to that Act been conditionally sold by the Government and subsequent to the Act forfeited by the purchaser:—

Held, that the said portions of land did not on such forfeiture become part of the pastoral leasehold but became Crown lands within sect. 4 of the Act and could be validly regranted by the Crown on conditional purchase or conditional lease.

APPEAL from a judgment of the Supreme Court (Windeyer and Innes, JJ., Martin, C.J., dissenting) (Nov. 10, 1886), on a special case stated by consent under the local Act 17 Vict. No. 21, sect. 42, in an action of trespass to land. That judg-

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR BARNES PEACOCK.

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ment was to the effect that certain applications by the appellant for conditional purchase and conditional lease were invalid, and that a verdict should be entered for the respondent with 1*s.* damages and costs. The special case is set out in the judgment of their Lordships.

Rigby, Q.C., and *E. W. Byrne*, for the appellant.

Sir *Horace Davey*, Q.C., and *Joyce*, for the respondent.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

This appeal is from a judgment of the Supreme Court of New South Wales in favour of the plaintiff Edols.

The action is brought to recover damages for an alleged trespass on land in the Colony. It is not necessary to refer to the declaration, as a special case, stated by consent, gives the admitted facts and questions for the consideration of the Court.

That special case, dated the 20th of July, 1886, stated, inter alia, that—

1. Before the making of the conditional purchase by John Stewart, the plaintiff was, and has still continued to be, the lessee from the Crown of the Burrawang Run.

2. On the 9th of February, 1882, the said John Stewart, under the land laws then in force, conditionally purchased 640 acres of land situated on the said run.

3. Upon the passing of the Crown Lands Act of 1884 (48 Vict. No. 18) the plaintiff, as such lessee as aforesaid, duly applied for a division of his said run, and for a pastoral lease of the leasehold area thereof, in accordance with the fourth part of the said Act, and a notification of the division of the said run was duly published in the *Government Gazette*, under sect. 76, on the 11th of July, 1885.

4. The said conditional purchase was wholly situated within the boundaries of that division or portion of the run which the Minister for Lands determined should be the leasehold area.

5. The said conditional purchase became and was duly declared forfeited by a notification in the said *Gazette* on the 17th of

November, 1885, and thereupon became Crown lands within the meaning of the Crown Lands Act of 1884.

6. On the 24th of December, 1885, the defendant applied to conditionally purchase 160 acres, portion of the said forfeited purchase, and for a conditional lease of 480 acres, the residue of the said purchase; and the said applications were approved and confirmed by the Land Board at Forbes on the 23rd of February, 1886.

7. It is admitted, for the purposes of this case,—subject, however, to the question of law,—that the said applications were duly made and subsequently confirmed by the board.

8. The plaintiff contends that the defendant's said applications were invalid, upon the ground that the portions of land applied for were within the leasehold area or division of the said run, and that they were therefore not open for conditional purchase or lease.

The eighth proposition fairly represents the question of law which arises between the parties, viz.:—whether, when Stewart's purchase of 640 acres became forfeited to the Crown, and again vested in the Crown as Crown lands, that lot of 640 acres was capable of being regranted by the Crown on conditional purchase and conditional lease. The question is not free from difficulty.

It seems to have been assumed both in the Court below, and at the Bar here, that it was not necessary to refer to the statutes prior to the Act of 1884, inasmuch as the question of law arises wholly on the construction of a few sections of the Act of 1884.

The conditional purchase by Stewart took place when the prior Colonial Act of 1875 (39 Vict. No. 13) was in force, but that statute was referred to only for the purpose of pointing out that if the forfeiture had taken place under it, or under the Crown Lands Alienation Act of 1861, the lands would have returned to the plaintiff as lessee of the run, but subject to a fresh sale by the Crown as provided by those Acts. Their Lordships too are unembarrassed by the examination of any documents—they have nothing before them but the case stated, and to its limits they are confined.

The Crown Lands Act of 1884, an Act to regulate the alienation, occupation, and management of Crown lands, came into

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force on the 1st of January, 1885, and it is to be borne in mind that the conditional alienation of the 640 acres to Stewart was then in full force and vested in Stewart, who was, their Lordships assume, also in possession. It represented but a small portion of the run, which was stated to include within its external boundaries an area of some fifty square miles.

The Crown Lands Act of 1884 has been rather severely handled, but though open to considerable criticism it must be in candour admitted that the complicated and conflicting interests it had to deal with rendered such legislation extremely difficult. Mr. Justice Windeyer has expressed its policy and its object as to the part of it which came immediately under their Lordships' consideration in terms which meet their approval.

The statute indicates considerable compromise. The run-holders who were possessed of territories under the name of "Runs" were to be dealt with, and if compelled to give up considerable portions of their runs they were compensated by holding the portion which might be allotted to them under a pastoral lease by a more certain and continuous tenure, and freed from the interference by purchases absolute or conditional and from the molestations of selectors. Their Lordships first turn to Part 4 of the Act.

By the 71st section "Every run-holder shall, within one hundred and twenty days after the commencement of this Act, lodge with the Minister a written application for a pastoral lease, in the prescribed form, of whichever portion of his run may be converted into a leasehold area under this part, and with such application shall furnish a plan of his pastoral holding on the prescribed scale, showing to the best of his knowledge and ability the boundaries and area of such holding, with all ranges, water-courses, lakes, or other natural features within such boundaries, and shall also mark on such plan the position of all lands held or occupied by him under any tenure other than pastoral lease, and of all improvements upon such holding made by him, or of which he claims to be the owner, and shall furnish in the prescribed form a statement of the average grazing capabilities of the holding, the nature and value of the improvements thereon, together with any other information required by the Minister,

and the run-holder shall divide by a line or lines the entire area of all Crown lands situated within such pastoral holding into two parts as nearly equal in area as practicable, and after receipt of the plan mentioned the Governor may by notice in the *Gazette* reserve temporarily from conditional sale any land within such pastoral holding, divided as aforesaid, pending a determination of which part shall be converted into a resumed area."

Sect. 72 "enables the Minister to require further information from the run-holder."

Sect. 74. "After receipt by the Minister of any application he shall cause to be marked upon the plan of the pastoral holding all portions of alienated land not already shewn thereon within such holding, and shall thereafter *notify* to the run-holder which part is to be the resumed area and *which* the pastoral lease; but the Minister if not satisfied with any proposed division, may require the same to be amended by the run-holder until it becomes satisfactory to him, and upon failure of the run-holder to make any such provision the Minister may determine the dividing line or lines, and deal with such holding under the provisions in this Act."

Sect. 76. "When the division of the run shall have been determined by the Minister as hereinbefore provided, a notification thereof shall be published in the *Gazette*, and the run-holder shall thereupon become entitled to a pastoral lease of the leasehold area, provided that until the rent thereof be determined he shall continue to pay the same rent as before the division of such runs, and when the rent shall be determined as hereinafter provided he shall for the time elapsed pay the difference between the rent paid and the rent determined."

It will be observed that the run-holder is bound with his application to furnish to the Minister full information to aid that officer in the performance of his very responsible duties, and that the dividing line which the run-holder is bound to make is not of the pastoral holding but of the Crown lands situated within it. Alienated lands, whether absolutely or conditionally aliened, would not form any part of the Crown lands so to be divided. The Minister has full power to call for further information, and his decision is practically final.

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Acting under the provisions contained in these sections the plaintiff Edols duly applied for a division of his run, and for a pastoral lease of the portion which might be converted into a leasehold area.

The application is not before their Lordships, but they assume that it was in the Form 39 given in the schedule to the regulations, and that it was sent in before the 1st of May, 1885.

The Minister of Lands, the proper officer appointed for the purpose, and having extensive quasi-judicial as well as ministerial powers, dealt with the application, and on the 11th of July, 1885, duly published his decision. That decision is not before their Lordships, but they assume that it specified the part which was to be the subject of the pastoral lease, and also defined the resumed area. The function of the Minister was then so far completed and discharged.

The fourth paragraph of the case stated specifies that the conditional purchase (i.e., Stewart's 640 acres) was "wholly situated within the boundaries of that division or portion of the run which the Minister determined should be the leasehold area." This obviously should be interpreted to mean no more than that it was situate within the external boundaries of that portion of the run, but not that it was or was intended to be within the pastoral lease. It could not have been lawfully made the subject of the pastoral lease, for it was then alienated land which had been taken out of the run as effectually as if the lease of the run had been so far vacated and it was then the conditional property in fee of Stewart. It might be afterwards forfeited to the Crown and become again Crown property. If the 640 acres had been expressly included in the pastoral lease it would so far have been illegal and inoperative. The notice of the forfeiture was not published until the 17th of November, 1885, and after the lapse of thirty days from that publication and not before the forfeiture was complete and the 640 acres became Crown lands within the meaning of the Act of 1884.

The plaintiff, however, contended that the true view to take of the forfeiture of a conditional purchase was that the land reverted to its former condition as if the conditional purchase had never been entered on or made, and that consequently the 640 acres

being locally within the ambit of the leasehold area it reverted to and became part of the leasehold. Their Lordships cannot adopt this view. There are many and formidable arguments against it, but it is sufficient to say that their Lordships can find no language in the Act to warrant them in coming to the conclusion that it reverted to or was brought within the pastoral holding, in the sense of forming part of it. There is a provision in the statute confined, however, to lands held under pre-emptive leases to the effect that all lands held under pre-emptive lease on the 31st of December, 1884, shall thereafter be deemed to be Crown lands discharged from such lease and shall revert to the pastoral holding (if any) of which they originally formed a part, but subject to additional rent.

Their Lordships now go back to some earlier provisions of the Act of 1884.

The interpretation section (sect. 4) is one that has given rise to much of the argument, and no doubt it is open to the criticism that the legislature has occasionally throughout the Act used the defined expressions in a sense different from that provided by the 4th section. But that section expressly guards the interpretation by declaring that the defined meaning is to be adopted "unless the context necessarily requires a different meaning," and their Lordships are bound to follow in that respect the mandate of the statute.

The Act deals with Crown lands only, and one of its great objects was to bring all Crown lands within the provisions of one statute and under the control of the executive. It is observable that there is no reservation expressed of any prerogative rights; sect. 4 defines Crown lands thus:—

"Crown lands" means lands vested in Her Majesty, and not permanently dedicated to any public use or granted or lawfully contracted to be granted in fee simple under this Act or any of the Acts hereby repealed.

And that definition is completed by sect. 136, which declares that land forfeited under the Act becomes Crown land and may be dealt with as such.

The other definitions to which their Lordships desire to refer are—"Leasehold area" means that portion of a pastoral holding

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for which a pastoral lease *may* be granted under this Act, and "resumed area" means that portion of a pastoral holding for which a pastoral lease *may not* be granted under this Act.

It was upon these definitions, coupled with sect. 21 (part 3), sub-sect. 3, that the principal contest arose in the argument. Clause 21 dealing with alienation provides that Crown lands belonging to any of the classes thereinafter specified shall be exempt from conditional sale. The only exempted class material to this case is,—"(III.) Lands comprised within leasehold areas notified under the provisions of Part IV."

For the plaintiff it was very vigorously contended that sect. 21 on its exemption of lands comprised within leasehold areas should receive a different interpretation from that given to leasehold area in the 4th or definition section, and should be taken to exclude all land within the external boundaries of the local area, though not being a portion of a pastoral holding for which a pastoral lease might be granted—that in effect "area" should be there interpreted as area physically of the pastoral holding, and that all lands within its continuous external boundaries were exempted.

The defendant on the other hand contended that "within the leasehold area" was to be read under the definition of sect. 4, as that which was within it as forming part of it, and of which as such a pastoral lease might be granted.

Their Lordships are of opinion that the latter is the correct view, and that there is nothing in the context of sect. 21 so far which would require a different meaning to be put on "leasehold area" in sect. 21, sub-sect. 3, from that given in the interpretation section.

"Leasehold area" and "resumed area" are put in contrast and each apply to some division of the Crown lands in the pastoral holdings. The first is applicable to that portion of the pastoral holding which may be, and the latter to that which may not be the subject of a pastoral lease under the Act; but it was asked, is the forfeited land part of the resumed area? The answer ought to be in the affirmative. The run holding, so far as it consisted of Crown lands, was, in all its parts, liable to resumption for the purposes of absolute or conditional sales—and clearly when a

forfeiture took place and the forfeited land reverted to the Crown, it became in the hands of the Crown resumed land and part of the resumed area.

Their Lordships have arrived at certain conclusions which govern the decision of the case and render it unnecessary to notice many other points of difficulty of construction presented in the course of the argument.

Their Lordships are of opinion that Stewart's 640 acres, though within the continuous external boundary of the leasehold area as notified by the Minister, yet did not belong to it, and was not a portion of the pastoral holding of which the Minister might make a pastoral lease, and that on the subsequent forfeiture of Stewart's title the land reverted to the Crown, and became "Crown land" within the definition of that expression in sect. 4, and part of the resumed area, and was not exempted from conditional sale within the 3rd sub-sect. of sect. 21.

Their Lordships in effect adopt the reasons of the late Lord Chief Justice as on the whole the most reasonable, and they are of opinion that the question contained in art. 10 of the special case stated—viz., whether the defendant's said applications, or either of them, were valid under the circumstances hereinbefore set out?—should be answered in the affirmative as to both, and that the judgment of the Supreme Court of New South Wales, dated the 10th of November, 1886, should be reversed, and a verdict entered for the appellant in terms of art. 12 of the said special case.

Their Lordships will so humbly advise Her Majesty.

The respondent is to pay to the appellant the costs of this appeal.

Solicitor for appellant: *G. P. Slade.*

Solicitors for respondent: *Bell, Brodrick, & Gray.*

[PRIVY COUNCIL.]

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Jan. 19, 20;
Feb. 4.

THE ATTORNEY-GENERAL OF THE STRAITS SETTLEMENT . . . . . } DEFENDANT;

AND

WEMYSS . . . . . PETITIONER.

ON APPEAL FROM THE COURT OF APPEAL OF THE STRAITS SETTLEMENT.

Law of the Straits Settlement—Crown Suits Ordinance of 1876, *sect.* 18, *sub-s.* 2—*Crown liable in Tort—Right of Access to the Sea.*

On a petition of right against the Government for damages done to the petitioner's tenement by the execution of reclamation and other works upon the foreshore in front of it:—

Held (*a*), that the petitioner by virtue of his tenement had the same right of access to the sea as a riparian proprietor has in respect to a tidal river.

(*b*) That under the Crown Suits Ordinance of 1876, sect. 18, sub-s. 2, the Crown could be sued in tort.

APPEAL from a decree of the Court of Appeal (June 24, 1886) affirming a decree of the Supreme Court, Penang (Dec. 23, 1885), in the matter of a petition of right.

The facts are stated in the judgment of their Lordships.

By his petition the respondent alleged that the reclamation works which gave rise to the suit would deprive the public residents of George Town of access to the premises adjoining the sea, on the harbour side of George Town; and that the respondent was thereby wrongfully deprived of access, ingress, and regress by sea from the harbour of Penang to his premises, and of the use of the shore for that purpose; and that such works were a trespass upon his land; and claimed, in respect of the matter alleged, the sum of $40,000, as damages and compensation, and an injunction.

The answer was to the effect (1) that the respondent's lessors

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN and SIR BARNES PEACOCK.

claimed under grants from the Crown under which they were only entitled to certain specific areas of lands granted to their predecessors in title by well defined metes and bounds (marked on the eastern or sea side of the said premises by a red line in the plan therein referred to) and were not entitled to the accretions if any nor to the sea-shore; and (2) that the reclamation works had been executed under the provisions of the agreement of the 29th of November, 1882, by which the owners of the lots of land on the east side of Beach Street in effect gave up their rights to the sea frontage, and that the respondent's lessors had executed this agreement, and the respondent was consequently estopped from making any claim.

The Chief Justice, before whom the original hearing took place, held that the reclamation works were carried out on land belonging to the Crown, and were not a trespass to the respondent's land. He was of opinion, however, that the respondent was in the position in which the original grantee, under the grant No. 122, would have been previously to the agreement of the 29th of November, 1882, relating to the reclamation works; and that, as being in the occupation of land adjoining the sea, he had a private right of access to and egress from the sea, distinct from his public right to the fishery and navigation therein; and he held that, as there had been an invasion of this private right, the respondent was entitled to damages.

Rigby, Q.C., and *Joyce*, for the appellant, contended that the respondent as lessee under his renewed lease in 1883 took the premises comprised therein subject to and bound by the rights which his lessor had by the agreement of 1882 conferred upon the Government. Having regard to the terms of the covenant for renewal in the former lease, the respondent could not have compelled its specific performance either against the lessor, or a purchaser from the lessor, or the Crown claiming under the lessor: Fry on Specific Performance, pp. 151, 660; *Milnes* v. *Gery* (1); *Vickers* v. *Vickers* (2); *Wilks* v. *Davis* (3); *Darbey* v. *Whitaker* (4). Further, if the lessor has so acted with regard to his property as

(1) 14 Ves. 400.
(2) Law Rep. 4 Eq. 529.
(3) 3 Mer. 507.
(4) 4 Drew. 134.

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to have incapacitated himself from renewing the same, it matters not what he purports to do, the renewed lease is pro tanto inoperative. This agreement of 1882 was not revocable, it amounted to a license by the owner to do certain works and thereby affect the owner's position and rights of property. Thereafter the owner could not grant any interest in the land derogating from that licence; and the lessee took by his renewed lease, subject to the licence. As to licences by an owner to do something on his land detrimental to his neighbour, see *Winter* v. *Brockwell* (1); *Liggins* v. *Inge* (2); *Plimmer* v. *Mayor, &c. of Wellington* (3). As regards the Crown's right of property and prerogative in respect of the foreshore, see *Attorney-General* v. *Tomline* (4). This is a claim which, when properly examined, is a tort, and no such action will lie against the Crown. Reference was made to *Farnell* v. *Bowman* (5) and to the Crown Suits Ordinance, XV. of 1876, sect. 18.

Sir *Horace Davey*, Q.C., and *Wurtzburg*, after their Lordships had observed that they did not require to hear the respondent in reference to the effect of the Ordinance just cited, contended that the respondent was entitled to the damages claimed. As lessee of land adjoining the sea, and with a frontage thereto, he has a private right of access and egress to and from the sea from and to such land, and of beaching and landing and hauling up boats on the sea-shore. He was in the same position as is a riparian proprietor with regard to access to a tidal river: *Lyons* v. *Fishmongers' Company* (6). The renewed lease was granted in pursuance of a covenant for renewal in the lease of 1877, and consequently the rights to which the respondent is entitled are paramount to any rights which the Crown obtained under the agreement with the lessor in 1882. The Government could only contract with the owner of the reversion subject to the due performance of the legal obligations which attached to the ownership.

Joyce replied.

(1) 8 East, 308.
(2) 7 Bing. 682.
(3) 9 App. Cas. 699, 714.
(4) 12 Ch. D. 214; S. C. 14 Ch. D. 58.
(5) 12 App. Cas. 643, 647.
(6) 1 App. Cas. 662.

1888. Feb. 4. The judgment of their Lordships was delivered by LORD HOBHOUSE :—

This litigation was commenced by a petition of right presented by Mr. Wemyss, in which he claimed $40,000 from the Government on account of damage done to his tenement by the execution of works upon the foreshore in front of it. His case is that free communication between his plot of land and the sea is of great importance to his business, and that whereas he was previously in enjoyment of such communication, the works of the Government cut it off.

The Chief Justice of the Supreme Court held that the petitioner could recover damages, which were afterwards assessed at $35,000. The Attorney-General appealed, but the Court of Appeal agreed with the Chief Justice. He now appeals further from their decree.

Wemyss is the lessee of the plot of land in question, which was acquired by grants from the Crown. At the date of the latest grant it was bounded by the sea, and is so described in the deed of grant. But the land gains upon the sea at this point, and in course of time a considerable deposit was formed in front of the plot, pushing back the sea and leaving an extent of open uncovered ground.

There have been several changes of proprietorship in the land as regards both the freehold and the leasehold interests. But they do not affect the present question, and it will be sufficient to speak of the successive owners of the freehold as the lessor, and the successive owners of the leasehold, including Wemyss, as the lessee.

On the 2nd of July, 1877, the lessor granted to the lessee a lease of the plot, with some specified exceptions, for the term of six years, at the rent of $130 per month. And it was agreed that if the lessee should be desirous of taking a renewed lease for the further term of six years, and should give six months' notice in writing of his desire, the lessor would execute a renewed lease for the term of six years, at such rent as might be either agreed upon by mutual consent, or fixed by four arbitrators, two to be chosen by the lessee and two by the lessor.

At some subsequent time, it does not appear precisely when,

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the excepted portions were thrown into the lease at an additional rent of $15 per month.

On the 29th of November, 1882, an agreement for reclamation of land from the sea was made between the Government and a number of persons, of whom the lessor was one, described as "owners of lots of land on the east side of Beach Street." The effect of the agreement was that the Government would reclaim and fill up the mud bank lying between the land owned by the owners and a certain line drawn to the eastward, which was the seaward side of it, and would construct a quay at the seaward end; that each owner would pay 65 cents a square foot for the reclaimed land lying between his lot and the quay; and should receive a grant of such land in fee simple with a quit-rent reserved.

On the 16th of December, 1882, the lessee gave to the lessor written notice of his desire to take a renewed lease of his plot at the former rent and on the former conditions.

On the 22nd of June, 1883, the lessor and lessee agreed to vary the terms of the lease by leaving in the hands of the lessor some godowns, said to be in disrepair and useless, in consideration of his paying assessments and rates upon them. But the lessee's rent was not to be diminished on that account. With this variation, the lease was renewed at the former rent, by deed dated the 15th of November, 1883, according to the covenant for renewal.

The reclamation works came opposite to the lessee's plot in February, 1884, when he presented his petition of right. The Government denied his right to recover damages on several grounds.

First, it was contended that his right to use the foreshore as an access to the sea was no greater than the right of any other of the public, and that it gave him no ground of action. To this it was answered that, with respect to riparian owners on tidal rivers, the contrary rule was laid down in *Lyon* v. *Fishmongers' Company* (1), and that for this purpose no distinction can be taken between a tidal river and the sea. Both the Courts below were of this opinion, and their Lordships concur in it. Indeed, it was not seriously combated at this bar on the part of the Government.

(1) 1 App. Cas. 662.

The next defence of the Government was that the Crown cannot be sued in tort, a point apparently not raised in the Colony, but insisted on here. It is disposed of by the Crown Suits Ordinance of 1876. The object of that Ordinance is to make better provision by law for (among other things) giving redress to persons having claims against the Crown in the Colony. And by sect. 18, sub-sect. 2, it is enacted as follows:—

"Any claim against the Crown founded on the use or occupation, or right to use or occupation, of Crown lands in the Colony, and any claim arising out of the revenue laws, or out of any contract entered into, or which should have or might have been entered into, on behalf of the Crown, by or by the authority of the Government of the Colony, which would, if such claim had arisen between subject and subject, be the ground of an action at law or suit in equity, and any claim against the Crown for damages or compensation arising in the Colony, shall be a claim cognizable under this Ordinance."

Their Lordships are of opinion that the expression "claim against the Crown for damages or compensation" is an apt expression to include claims arising out of torts, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning.

In the case of *Farnell* v. *Bowman* (1) attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.

Another contention, which appears to have been more pressed in the Court below than here, was that the lease of 1883 was not in pursuance of the covenant of 1877, because the subject-matter of it was not identical. If that were so, the lessor could not by his lease pass to the lessee any right which he could not himself

(1) 12 App. Cas. 643, 647.

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have enforced; and the agreement of November, 1882, effectually precluded the lessor from complaining of injury from the reclamation works.

Their Lordships however are clear, agreeing herein with both the lower Courts, that the circumstance that the latter lease did not embrace the whole property comprised in the earlier one is no reason for holding that it was not a fulfilment of the covenant for renewal. The lessee insisted on his covenant, and not the less so because for mutual convenience an arrangement was made which the parties might have made at any time, and which did not in any way affect the interests of the owners of the foreshore.

An ingenious argument was then presented, and very ably presented, on behalf of the Government, to the effect that its right to execute works which might injuriously affect the land of the owners was prior in time to the interest conferred by the renewed lease. It is said that the covenant for renewal was one that could not be enforced by way of specific performance; that it conferred no interest in the land upon the lessee; that no such interest was acquired by him till the 22nd of June, 1883, when the terms of renewal were agreed on; that in November, 1882, the lessor had given to the Government a licence to execute the works affecting the land; that he thereby bound himself not to grant any interest in the land which should derogate from that license; that his obligation affected the land; and that what the lessee took under the renewal he took subject to the licence.

Whether the argument would be sound if the agreement of the 29th of November, 1882, purported to give such a licence to the Government, is a point on which their Lordships do not pronounce any opinion. They think that the agreement is not to be so construed. The owners agree to nothing except to pay for the land. They give no warranty, covenant, or licence. They do not purport to represent anybody but themselves. There is nothing to shew that the Government was not taking the usual course, by making inquiry of the parties in actual possession, and dealing with them according to their interests. Undoubtedly the owners preclude themselves, and of course all who claim through them by title subsequently arising, from complaining if

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the works they have sanctioned injure their property. That is all. The interests of other parties, of all who claim under prior obligations, are left untouched. The view now put forward by the Government comes to this, that, without any express word to that effect, the lessor bound himself first to commit the injustice of refusing to perform his covenant with the lessee, and secondly to pay the very substantial sum which would be awarded as damages for breach of covenant. Such a construction puts an unjustifiable strain on the expressions, in order to reach a very improbable conclusion. Their Lordships hold that the agreement of the 29th of November, 1882, does not in any way diminish the lessor's power or obligation to perform the covenant for renewal, or the lessee's rights under that covenant.

The result is that, in their Lordships' opinion, the appeal ought to be dismissed, with costs, and they will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Sutton & Ommaney.*
Solicitors for respondent: *Sharpe, Parkers, Pritchard & Sharpe.*

[PRIVY COUNCIL.]

J. C.*
1887
Dec. 8, 9, 13.
1888
Feb. 7.

THE GOVERNMENT OF NEWFOUNDLAND DEFENDANT;

AND

THE NEWFOUNDLAND RAILWAY COMPANY AND OTHERS . . . . . } PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Contract—Apportionment—Counter-claim for Unliquidated Damages—Set-off against Assignees of the Contract.

By contract in 1881 embodied in a statute the plaintiff company covenanted to complete a railway in five years, and thereafter to maintain and continuously operate the same. In consideration thereof the Government covenanted:

(*a*) to pay the company upon the construction and continuous operation of the line an annual subsidy for thirty-five years, such subsidy "to

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* *Present:*—LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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attach in proportionate parts and form part of the assets of the company as and when each five-mile section is completed and operated;"

(*b*) to grant to the company in fee simple 5000 acres of land for each one mile of railway completed, on completion of each section of five miles.

It appeared that the company completed a portion of the line, and received from the Government on the completion of each five-mile section the specified grant of land, and certain half-yearly payments in respect of the proportionate part of the subsidy which was deemed by the parties to attach thereto; thereafter the contract was broken by the company, and the Government refused further payments.

In a suit by the company and its assignees of a division of the railway and of the rights relating thereto:—

Held (1), that on the true construction of the contract (*a*) each claim to a grant of land was complete from the time when the section which had earned it was complete; (*b*) on the completion of each section a proportionate part of the subsidy became payable for the specified term, but subject to the condition of continuous efficient operation;

(2), that by the law of the Colony the Government were entitled to set-off a counter-claim for unliquidated damages for the company's breach of contract in not completing the line;

(3), that the set-off availed against the assignees of the company, the claim and counter-claim having their origin in the same portion of the same contract, the obligations which gave rise to them being closely intertwined.

Young v. *Kitchin* (3 Ex. Div. 127) approved.

APPEAL from a decree of the Supreme Court (Jan. 5, 1887) in a petition in the nature of a petition of right brought by the respondents in the said Supreme Court against the Government of Newfoundland under the provisions of Consolidated Statutes of Newfoundland, tit. 4, c. 29.

The petition was by the respondents to recover the arrears of an annual subsidy and certain lands which the respondents claimed under a contract made between the Government of Newfoundland and the Newfoundland Railway Company.

The facts and proceedings are stated in the judgment of their Lordships.

Rigby, Q.C., and *Buckley*, Q.C. (*Munro*, with them), for the appellants, contended that according to the true construction of the contract the right of the railway company was determined, either to call for further payments of the subsidy or for the grants of land. The railway had not been completed within the time fixed. The company was not bound to grant a proportionate or any part either of the subsidy or land on completion and operation of

every five-mile section. The subsidy was for an entire sum, and the condition precedent to payment was the complete fulfilment of the contract. There had been no completion or continuous operation of the line either in whole or in part, within the meaning of the contract. The interest taken by the assignees was similar to that of the assignors, and liable to be defeated by the company's failure to observe the terms and conditions of the contract. The appellants, if liable on their contract, were entitled to counter-claim against the company for their breaches of contract, and such counter-claim or set-off was good against the assignees. See *Roxburghe* v. *Cox* (1); *Young* v. *Kitchin* (2).

The Attorney-General (*Sir R. Webster*) and *Sir Horace Davey*, Q.C., (*J. D. Fitzgerald*, with them), for the respondents, contended that by the true construction of the contract the railway company did not forfeit their right either to the subsidy or to the grants of land by reason of their non-completion of the whole line within the time limited. The company was entitled to recover in respect of the portion of the railway which it had completed. What the respondents, that is, the company or its assignees, were entitled to was payment of the proportionate parts of the subsidy and the grants of the land which were attributable to the completed parts of the railway. The assignees, moreover, were not affected by any counter-claims by the appellants. Set-off is a question of procedure. You may set off in an action inter partes, not in an action by third parties who are entitled to sever their claim from the rest of the contract, when the claim is a completed one, notice of the severance and assignment having been given to the debtor.

Reference was made to *Rawson* v. *Samuel* (3); *Smith* v. *Parkes* (4); *Watson* v. *Mid Wales Railway Company* (5); *In re Milan Tramways Company* (6); *Harter* v. *Coleman* (7); *Bradford Banking Company* v. *Briggs* (8).

Buckley, Q.C., replied, citing *Mangles* v. *Dixon* (9).

(1) 17 Ch. D. 520.
(2) 3 Ex. D. 127.
(3) 1 Cr. & P. 161, 178.
(4) 16 Beav. 119.
(5) Law Rep. 2 C. P. 593.
(6) 22 Ch. D. 122; S. C. 25 Ch. D. 522.
(7) 19 Ch. D. 630.
(8) 12 App. Cas. 29.
(9) 3 H. L. C. 702.

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1888. Feb. 7. The judgment of their Lordships was delivered by LORD HOBHOUSE:—

In this case, the defendant is the Government of Newfoundland. The plaintiff company was incorporated for the purpose of constructing and working a railway in pursuance of a contract with the Government, for which the Government undertook to pay a subsidy and to make grants of land. The other plaintiffs, as trustees for bondholders of the company, are assignees of a portion of that railway, of whatever right the company have to the subsidy, and of the grants of land in respect of such portion. The plaintiffs contend that the Government is bound to pay a certain amount of subsidy and to make grants of land for a completed portion of the railway, though as a whole it is not completed. The Government denies the liability, but, if it exists, sets up certain counter-claims against the company.

The precise points in issue are explained in a series of questions which, by consent of the parties, were submitted for the judgment of the Court before going into evidence upon questions of fact, and which it is convenient to set forth.

The questions are:—

1. Whether by the non-completion of the whole railway within the time stipulated, the company forfeit their right to the payment of the subsidy in respect of so much of the line as is complete and operated?
2. Whether by the non-completion of the whole railway within the time stipulated, the company have forfeited their right to grants of land in respect of the completed portions?
3. Are the trustees for the bondholders, the petitioners Evans and Adamson, entitled to have payment made to them, or to the company on their behalf, of the proportionate parts of the subsidy attributable to the completed parts of the railway so long as the same are operated, even though the company be in default as to the completion of the whole line, and the Government may have a good claim for damages against the company in its corporate capacity?

4. Are the trustees for the bondholders, the petitioners, Evans and Adamson, entitled to have the grants of land attributable to the sections of railway already completed made to them or to the company on their behalf, even though the company be in default as to the completion of the whole line, and the Government may have a good claim for damages against the company in its corporate capacity?
5. Whether, if the first question is decided in favour of the petitioners, the Government can set off or counter-claim against the claim of the petitioners to the subsidy any claims by the Government against the company?
6. Have the defendants the right in these proceedings to make set-off or counter-claim as in their answer they do?
7. If such set-off or counter-claim be valid as against the railway company, is it valid as against the other plaintiffs, the trustees for the bondholders?

The Supreme Court answered all the questions in a sense favourable to the assignee plaintiffs. Upon this it was unnecessary to debate any questions of fact, and on the 5th of January, 1887, the Court decreed that the Government should pay the proportion of subsidy, and should make the grants, mentioned in the decree. From that decree the Government has appealed. The question turns entirely on the application to the events which have occurred of the provisions of an Act of the Newfoundland Legislature, which embodied a contract between the Government and a syndicate organised to construct the railway, and also a charter of incorporation for the company.

The Act was passed on the 9th of May, 1881. It shews that the Government had intended itself to construct the railway, and had in the preceding year obtained the requisite powers from the Legislature; but afterwards it was thought more desirable that the work should be done by a company, and a contract had been made for the purpose with the parties afterwards incorporated. It then ratifies the contract, and sets it out at full length.

The contract bears date the 20th of April, 1881. By paragraph 1 the company covenants to locate, construct, equip,

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maintain, and continuously operate 340 miles of railway, commencing at St. John's and running to Hall's Bay, with certain connections and branches, and to provide stations and other essentials necessary to the efficient operation of the road, at such places as will best accommodate the public and the shipping interests of the country. And by paragraphs 10, 11, and 12, it is provided that when the line is completed the company shall have a specified minimum of plant and equipment; that it shall furnish more as the business developes, so that the travel and shipping interests of the country may be fully accommodated; that it shall efficiently and continuously operate the lines; that there shall be at least one passenger train each way each day over the whole line; that it shall provide the Government with all necessary facilities for transporting mails over the line, attaching a mail car to each through daily passenger train each way.

The most material paragraphs are 13 and 14, which run as follows:—

"13. The said railway and branch lines shall be completed and in operation within five years from the date of this contract. In consideration of the premises, and of the due and faithful performance by the said syndicate company of all and singular the covenants and agreements herein contained on their part to be performed, the Government of Newfoundland covenants and agrees:—

"14. To pay the syndicate company, upon the construction and continuous efficient operation of the line, a subsidy of $180,000 per annum, in half-yearly payments, in gold, in London, England, on the 1st day of January and the 1st day of July in each year, for a period of thirty-five years; such annual subsidy to attach in proportionate parts and form part of the assets of the said company, as and when each five-mile section is completed and operated, or fraction thereof, at terminus at Hall's Bay."

Then follow, under the heading of "Grants of Land," several paragraphs relating to that subject. The first sentence of paragraph 15 is the most important, and is as follows:—

"*Grants of Land.*

"15. The Government to grant in fee simple to syndicate company 5000 acres of land for each one mile of railway completed throughout the entire length of 340 miles. The said fee simple grant of 5000 acres of land per mile to be made to the said syndicate company upon completion of each section of five miles of railway, or fraction thereof, at the terminus at Hall's Bay."

In the rest of paragraph 15, and in paragraphs 16 and 17, are contained provisions for ascertaining the lands to be granted.

By paragraph 20 it is stipulated that all land necessary for the railway shall be provided by the Government, who may, to recoup themselves, retain $90,000 out of the last annual subsidy.

Paragraph 22 is as follows:—

"22. The said syndicate company, within three months after the execution of this contract, shall deposit with the Government of Newfoundland, as security for the performance of this contract, bonds of the United States of America, or other approved securities, in amount equal to $100,000, the same to be returned to the said syndicate company upon completion of the 340 miles of railway; the interest in the meantime shall be paid to said syndicate company."

By paragraph 28 the Government takes power to purchase, at any time after the expiration of thirty-five years from the date of the contract, the property and rights of the company in the lines of railway, and all property belonging to the company in the island.

The incorporation of the company with proper provisions is stipulated for by paragraph 20 of the contract, and by a schedule attached to it; and by sect. 2 of the Act it is enacted that, for the purpose of incorporating the individuals described, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the schedule shall have force and effect as if it were an Act of the Legislature, and shall be an Act of incorporation within the meaning of the contract.

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On the 15th of July, 1882, the company assigned to the other plaintiffs the southern division of the railway and its entire plant and undertaking, constructed or to be constructed, being a distance of 100 miles, and all rights relating to that division or branches, including the grant of 5000 acres of land for each mile of railway forming part of that division or branches, and also all interest of the company in respect of the said division or branches in the subsidy of $180,000 payable by the Government in accordance with the provisions of the said Act. The assignees were to hold the property assigned for the security of persons holding bonds which under the powers of the Act the company were about to issue to an extent not exceeding £400,000. It appears that bonds have been issued to the full extent.

On the 20th of April, 1886, the railway should, according to the contract, have been completed. At that time the company had only completed eighty-five miles, or seventeen of the five-mile sections; and it must be taken for the purposes of the present questions that no more has been done, or ever will be done, by the company. It does not appear when any five-mile section was completed, but as each has been completed the parties have considered that a proportionate part of the subsidy attached, and the Government has begun paying that proportion on the next half-yearly day of payment. On this footing the amount due on the 1st of July, 1886, was seventeen sixty-eighth parts of the whole. But by that time the company had failed to perform the contract, and the Government refused to pay any more.

Certain admissions have been made in the suit, by which it appears that the country through which the portions of the completed railway run are much more densely peopled than the country in which no work has been done.

Their Lordships now address themselves to the questions in the suit. As regards the grants of land, they feel little difficulty. It does not appear quite clearly what has been done with respect to these lands, but the argument has proceeded on the footing that in some cases grants have been completed; in some the company has selected blocks (as by the contract it has a right to do), but no grants have been made; and in the rest there has been no selection of blocks.

In their Lordships' view the contract is not so framed as to make the grants of land dependent in any way on the completion of the whole line, or upon anything but the completion of each five-mile section. As each of those sections was completed, the right to 25,000 acres of land became perfect. The company has time allowed to select its blocks, but may if it pleases make the selection at once. There may, or rather must, be delays in selection, in negotiations after selection, and in the formalities of conveyance. But their Lordships think that it would not be in accordance either with the object for which grants of this kind are intended, viz., the immediate attraction of settlers, or with the frame of the contract, if they were to hold that the perfect right which the company has gained on completion of each section is lessened by such delays. Indeed, the appellants' counsel agreed that it would be wrong to interfere with grants already completed, contending only that the Government is not bound to do anything more than has been done, or at all events that its counterclaims may be enforced in incomplete transactions. Their Lordships hold that each claim to a grant must be treated as complete from the time when the section which has earned it was completed.

The questions relating to the subsidy are much more difficult. It is argued for the Government that the contract is for the whole railway as an entire thing; that it is to serve the travel and shipping interests of the whole tract of country in contemplation; that the provisions relating to plant and efficient operation refer always to the whole and never to a portion; that no part of the contract contemplates the completion of part and the abandonment of the remainder; that in fact the company has only taken up the most lucrative portion; that, under the express words of paragraphs 13 and 14, the construction of the entire line is a condition precedent to the payment of the subsidy, and the efficient operation of the line is a condition precedent to the payment of each instalment; that the subsidy also is treated as an entire thing; and that on the 20th of April, 1886, the condition was broken and nothing was payable.

Undoubtedly these arguments have great force. The contract assumes throughout that the railway will ultimately be com-

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pleted; it nowhere contemplates partial completion and partial abandonment; and there is always much difficulty in applying the terms of a contract to a state of events which the parties have never had in their minds. But their Lordships think that the last provision of paragraph 14 requires more effect to be given it than the arguments for the Government allow. Indeed, if pushed to their logical conclusion, they would deprive that provision of all substantial effect. If the subsidy is so entire a thing that it cannot be severed, the whole must begin and end at the same time. No part of it could be payable till completion of the whole railway: and, as on the 20th of April, 1886, only part was completed, nothing would be payable at any time.

The Government certainly have not acted on this view, and their counsel shrank from pressing it at the bar. They argued that, though it might be right to pay the amount of subsidy earned during the currency of the five years, yet when that term had expired, and the conditions precedent were irretrievably broken, the case was altered, and it became right to insist upon the entirety of the contract.

Upon this their Lordships think that the expression "to attach in proportionate parts and to form part of the assets of the company" imports a permanency of interest greater than would be satisfied by the currency of the subsidy for two or three years or a few months, as the case might be. Further, it is clear that the theory now under consideration breaks up the unity of the subsidy. If, for example, a proportionate part commenced in 1883, it would end in 1918, whereas other parts would run on later up to the year 1921. But when once we abandon the unity of the subsidy, it is a question only of degree how far the contract requires it to be abandoned. To put the matter briefly, if nothing is payable immediately after the completion of a five-mile section, the last sentence of paragraph 14 is reduced practically to a nullity; if anything, the subsidy loses its unity, and becomes a number of subsidies payable for different periods.

Feeling as they do the impossibility of reconciling all parts of this contract, their Lordships give it the best construction they can, and they conclude that the provision with regard to five-mile sections has the effect of relaxing the extreme stringency with

which the rest of the contract would bear upon the company; and that, on the completion of each section, one sixty-eighth part of the whole subsidy became payable as a separate subsidy, beginning at the next day of payment and continuing for thirty-five years, though subject to the condition of continuous efficient operation.

Then comes the question of counter-claim. Whether the Government can establish any has not been ascertained. But it is clearly conceivable that they may shew damage arising from the non-construction of the railway, whether by the delay, or by being left to provide for the more sparsely peopled country while paying for the railway working among the more densely peopled a subsidy calculated on an estimate of the whole, or by having purchased land now rendered useless, or by the withdrawal of the $100,000 security under circumstances which are not in evidence. If they have claims of this kind it would clearly be a great hardship on them to be unable to relieve themselves pro tanto from the payment of the subsidy.

The Colonial Legislature has adopted the convenient and just rule introduced into England by the Judicature Act, so that damages unliquidated at the time of the action may be made the subject of counter-claim. And the plaintiffs do not deny that, as between the Government and the company, such counter-claims may be set up, but they contend that the assignment of July, 1882, has altered the position of all parties, and that, as against the plaintiff assignees, the counter-claims cannot be set up.

As regards hardship on the Government, it is precisely the same in kind whether its claims are disallowed as between it and the company or as between it and the assignees; though the extent of hardship might be less in the latter case, if the assignees find that the bonds are wholly or largely made good by the proceeds of the railway and of the 425,000 acres of land attached to it. But the question is to be decided, not on grounds of hardship, but on principles of law and the decisions which illustrate them.

The assignees, indeed, contend that the Act of 1881 and the company's charter contain provisions which, in any controversy

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with the Government, place them in a better position than the company. The charter contemplated that the company will borrow money, and says that it may do so, and may issue bonds upon the faith of the corporate property. But their Lordships cannot find any indication throughout the whole of the documents which should lead a lender of money to think that the corporate property is anything more than what the company may justly claim, or that he is in any other way to stand on higher ground than the borrower.

But then it is said that the rule of law deducible from the authorities is, that when a debt or claim under a contract has been assigned and notice given to the debtor, which may be assumed to have been done in this case, the debt or claim is so severed from the rest of the contract that the assignee may hold it free from any counter-claim in respect of other terms of the same contract. So, at least, their Lordships understood the argument. And as such a limitation of the right to set off a counter-claim is new to them, they are led to examine carefully the cases relied on to support it.

In *Watson* v. *Mid Wales Railway Company* (1) the material facts were as follows:—On the 18th of March, 1865, the company gave bonds to Watson in consideration of "work and labour." Four days afterwards they demised to him their whole undertaking at a certain rent. He assigned his bonds to another company, who gave notice to the railway company. After the assignment rent accrued due to the railway company an action was brought on the bonds in Watson's name against the railway company, who claimed to set off the rent. That claim was disallowed.

It was pointed out that Mr. Justice Willes examined the case to see whether there was any agreement that one debt should go in liquidation of the other, and that the balance only should be considered as the debt. And it was suggested that such an agreement was necessary to support counter-claims against assignees. But Mr. Justice Willes only entered upon that examination because the two debts had no common origin, and, in default of such an agreement, no connection with one another.

(1) Law Rep. 2 C. P. 593.

The true principle is shewn by Bovill, C.J., in the following terms:—"No case has been cited to us where equity has allowed against the equitable chose in action a set-off of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it."

It certainly cannot be said that the claim by the Government for non-construction of the railway arises out of matters not connected with the payment of the subsidy. On the contrary, the obligation to construct the whole is so intimately connected with the obligation to pay for a portion, as to give rise to a forcible argument that one is a condition precedent to the other; so intimately that their Lordships have serious difficulty in disengaging them, and can only do so by modifying the language of part of the contract.

The next case is that of *In re Milan Tramways Company* (1). Hutter was a director of that company, and in the year 1879 he purchased the claims of several of its creditors. On the 12th of January, 1880, an order was passed for winding up the company. On the 5th of February a charge was made against Hutter for misfeasances as a director. On the 26th of February he assigned to one Theys the claims against the company which he had purchased. On the 31st of May Theys took out a summons to be admitted as a creditor on those claims. On the 25th of July Hutter was found guilty of misfeasance and ordered to pay a sum of £2000. It was sought to set off this sum against Theys' claim. Mr. Justice Kay rejected the set-off, and said that the case fell within Chief Justice Bovill's judgment in *Watson's Case.* (2) The Court of Appeal confirmed that decision (3). In their judgments, Cotton and Fry, L.JJ., both point out that Theys was enforcing claims, not of Hutter, though the right to them was for a time vested in him, but of other creditors; and that there were no cross demands between Theys and the company. It is obvious, indeed, that the two demands were of totally different origin, and that no connection was ever established between them.

(1) 22 Ch. D. 122. (2) Law Rep. 2 C. P. 593.
(3) 25 Ch. D. 522.

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In the case of *Bradford Bank* v. *Briggs & Co.* (1) the defendants, Briggs & Co., had by their articles of association a first charge upon the shares of their shareholders for all debts due from them. Easby was a shareholder, and in November, 1879, he gave to the plaintiffs, the bank, a charge for future advances. Notice of the charge was given to the defendants, who did not give any notice to the bank of their charge till June, 1881. It was held that advances made by the bank on the faith of their charge took priority of Easby's debts to the company contracted after the notice given by the bank.

The only difficulty in this case arose from the terms of the Joint Stock Companies Acts. Apart from that, the case exactly resembled the well-known case of *Hopkinson* v. *Rolt* (2), which settled the rules of priority as between a first mortgage for securing future advances and a second mortgage, in respect of advances made by the first mortgagee after notice of the second mortgage. Lord Campbell there says, "The first mortgagee is secure as to past advances, and he is not under any obligation to make further advances. He has only to hold his hand when asked for a further loan." That was also the position of Briggs & Co. towards Easby.

The present case is entirely different from any of those cited by the plaintiffs' counsel. The two claims under consideration have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that

(1) 12 App. Cas. 29. (2) 9 H. L. C. 514.

in this contract the claims for subsidy and for non-construction ought to be set against one another.

It is hardly necessary to cite authorities for a conclusion resting on such well-known principles. Their Lordships will only refer to *Smith* v. *Parkes* (1), not so much on account of the decision as for the sake of quoting a concise statement by Lord Romilly of the principle which governed it. He says, "All the debts sought to be set off against the defendant Parkes are debts either actually due from him at the time of the execution of the deed" (this was the deed by which the third party who resisted the set-off was brought in) "or flowing out of and inseparably connected with his previous dealings and transactions with the firm." That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice, and has been altered. Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment.

It appears to their Lordships that in the cited case of *Young* v. *Kitchin* (2) the decision to allow the counter-claim was rested entirely on this principle.

In stating this conclusion their Lordships confine themselves to the claims on account of non-construction. Much of the foregoing reasoning does not apply to the claim on account of the withdrawal of the security. When the circumstances of that transaction are ascertained, they may shew a fresh and voluntary dealing on the part of the Government raising wholly new obligations after notice of the assignment, and they may afford no ground for counter-claim against the assignees, even if they afford any against the company. That matter must be left for the Supreme Court to deal with when the facts are known.

It remains to say how the questions should be answered and the decree dealt with. Their Lordships propose to answer the questions as follows:—

(1.) In the negative.

(2.) In the negative.

(1) 16 Beav. 119.

(2) 3 Ex. D. 127.

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(3.) They are entitled, subject to such counter-claims pleaded in this action as may be established against them in fact and law.

(4.) In the affirmative.

(5.) They may counter-claim damages, as mentioned in answer to Question 3.

(6.) Such counter-claim may be made in these proceedings.

(7.) In the affirmative, so far as regards the non-construction of the railway.

Their Lordships think that the proper course will be to discharge so much of the decree below as directs payment of the subsidy, and instead thereof to direct an inquiry whether the Government is entitled to make any and what claim against the company in respect of any of the matters mentioned in the answer of the Attorney-General. Such an inquiry will embrace the subject of the $100,000 security, though it is impossible, or at least very inconvenient, to deal with that subject in answering the questions. The method of inquiry, whether by action or issue, or before the Court itself, should be left for the Court to determine. The rest of the decree should be affirmed.

The subject of costs in the Court below need not be mentioned. As regards the costs of this appeal, each party has lost and won on a substantial point, and each must be left to pay their own costs.

Their Lordships will humbly advise Her Majesty in accordance with the foregoing opinion.

Solicitors for appellants: *Burn & Berridge.*

Solicitors for respondents: *George Davis, Son, & Co.*

[PRIVY COUNCIL.]

BANK OF AFRICA, LIMITED . . . . DEFENDANT; J. C.*

AND 1888

THE COLONIAL GOVERNMENT . . . PLAINTIFF. *Jan.* 27, 28; *Feb.* 7.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of the Cape of Good Hope—Act 6 *of* 1864, *sect.* 9—*Construction—Bank-Notes in circulation or outstanding.*

Where a bank consisted of a head office and several branches, some of which as well as the head office issued notes, *held*, that by the true construction of Act 6 of 1864 a return of notes in circulation or outstanding need not include bank-notes, whether issued by the head or branch office, which at the date of such return are in possession of any office of the bank. Sect. 9 merely directs the mode of making the returns. It does not enlarge the basis of returns, nor treat every office of issue as, for the purposes of the Act, a separate and independent bank.

APPEAL from a decree of the Supreme Court (Dec. 17, 1886), in favour of the respondent.

The plaintiff claimed that the defendant might be ordered to amend the monthly returns of the amount of bank-notes in circulation by each of the branches of the Bank of Africa, which under the provisions of the Colonial Act, No. 6 of 1864, had been rendered since the month of June, 1882, by adding to the returns of each branch the amount of bank-notes of such branch which at the date of the returns aforesaid were held by other branches of the said bank, and that he might be ordered to pay to the plaintiff the excess duty which under the provisions of the Act might be found to be due upon such amended returns.

The matters in issue between the parties depended upon the true construction of the said Act No. 6 of 1864.

The facts of the special case and the material sections of the Act are given in the judgment of their Lordships.

The material passage of the judgment of the Chief Justice were as follows:—

"Coming then to the real question between the parties, there

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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can be no doubt that the company, by allowing any of its offices to issue its own notes, confers on such office to that extent a certain individuality of its own. The notes are payable only at the office which issued them; and although the company may allow its other offices to pay those notes, it is not bound to do so. There is much force, therefore, in the argument that, independently of the provisions of the 9th section of the Act, notes once issued are to be deemed to be in circulation, and consequently liable to duty, until they come back to the very office which first issued them. This argument acquires additional force in the case of notes which the issuing office has, for the purposes of Act 19 of 1865, represented as being in circulation, although in the possession of other offices of the same company. The argument is further strengthened—it certainly is not weakened—by the terms of the 9th section of Act 6 of 1864.

"If the defendant's claim for an exemption is well founded, the elaborate provisions of the 9th section were wholly unnecessary. From his point of view a simple direction, that each branch office which issues its own notes shall make the required returns of its circulation would have sufficed; but to prevent any doubts as to its notes in hand in other offices of the same bank, a proviso might have been added that such notes shall be deducted from the returns. Instead of that the section contains detailed provisions which are quite inconsistent with the defendant's contention. The 1st sub-section directs every branch bank, which issues its own notes, to make its returns direct to the treasurer general, 'precisely as if such bank were an independent and unconnected bank, and not a branch.' The defendant claims the right to deduct from such returns notes which each branch has issued, but which are in possession of the head office and other branches, precisely as if such issuing branch were connected with the head office and other branches. The 2nd and 3rd sub-sections prohibit any office of issue, in calculating its bank notes outstanding, from deducting from its circulation any notes of the other offices, which note such office of issue may happen to have on hand.

* * * * *

"As to the 4th sub-section, the use of the word 'whole' shews

that the object of this sub-section is not to contract but to enlarge the basis of the returns; and the words, 'including all its branches,' appear to me to have been introduced in furtherance of this object. According to the defendant's reading of the Act, the legislature, in using the words 'including all its branches,' really meant to say, 'but shall not include (as part of such outstanding circulation) such notes in any of its branches.' The more natural and consistent, although not strictly grammatical, reading would be 'including (as part of such outstanding circulation) such notes in all its branches.'

"But, apart from any detailed criticism of the 9th section, I take its general scope to be, to establish the rule that for the purpose of collecting bank-note duty, each office of issue whether head or branch, must be treated as a separate and independent bank. According to this view, most of the minute provisions of the sub-sections were introduced, with the object of preventing any evasion of the rule. A good deal has been said about the hardship upon the Bank of Africa, that it should be made to pay duty on more than its 'actual Colonial note circulation,' but an argument of this nature should be addressed to the legislature rather than to this Court."

Rigby, Q.C., and *Arbuthnot*, for the appellant.

The Attorney-General (*Sir Richard Webster*), *Wright*, and *Mackarness*, for the respondent.

Reference was made to *Prince* v. *Oriental Bank Corporation* (1) and *Oriental Bank Corporation* v. *Wright* (2).

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal from a judgment of the Supreme Court of the Colony of the Cape of Good Hope, on a special case in an action between the Colonial Government and the Bank of Africa (Limited). The case stated that the Bank of Africa is a joint stock bank carrying on business in the Colony as bankers, and issuing bank-notes; that the bank has its head office at Port

(1) 3 App. Cas. 325. (2) 5 App. Cas. 856.

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Elizabeth, and has several branch offices, viz., at Cape Town, Kimberley, Aliwal North, Cradock, East London, Graham's Town, King William's Town, Queen's Town, and Beaufort West; of these offices only the head office at Port Elizabeth and the offices at Cape Town and Kimberley issue or have at any time issued their own notes, Kimberley having ceased to issue its own notes since the 30th of June, 1886. Since the month of June, 1880, the head office and the Cape Town and Kimberley branches have each made separate returns of their note circulation for the purposes of the Colonial Act, No. 6 of 1864; in making such returns the head office and the two branches have treated all notes of the bank in the possession of any of its offices upon the last day of any given month as not being in circulation or outstanding on that day, and have excluded all such notes from the returns: that on comparing the amounts published by each branch bank under the provisions of Act 19 of 1865 of the notes of such bank in circulation on any particular day with the returns made by such branch bank under the provisions of Act 6 of 1884 to the Treasury, it is found that the amounts do not agree, and that the amounts of the notes in circulation according to the statements made under Act 19 of 1865 are considerably in excess of the amounts of the notes in circulation according to the returns made under Act 6 of 1864; that the Kimberley branch has been in the habit of re-issuing to the public notes of the said bank other than notes originally issued by itself. That the plaintiff contended that each of the three offices issuing notes—the head office, the Cape Town office, and the Kimberley office—should have included in its returns,—(*a*) all notes issued by it and in possession of either of the oth r two of the said three offices, (*b*) all notes issued by it and in the possession of any other office of the bank in the Colony upon the last day of each month for which any such return was made, and that duty should have been paid upon all such notes accordingly, in terms of the Act 6 of 1864; that the defendant disputed this contention, and said that all the returns had been duly made in manner provided by the Act; that it was agreed between the parties that if the Court should by its judgment declare the contention of the plaintiff to be correct, wholly or in part, the

defendant should amend all of the returns which had been made by the bank since the 1st of January, 1882, in accordance with such judgment, and should pay to the plaintiff such additional duty under the Act as might upon the amended returns appear to be payable in excess of the duty already paid, with the costs of the suit; and that if the defendant's contention should be declared to be correct, judgment should be recorded to that effect, and the plaintiff should pay the costs of the suit.

On the 17th of December, 1886, the Supreme Court granted judgment in terms of the plaintiff's contention, with costs.

The Act 6 of 1864 of the legislature of the Cape of Good Hope recites that the privilege enjoyed by the joint stock banks of the Colony of issuing bank-notes is one in regard to which a duty regulated by the average amount of such notes kept in circulation by each bank may justly be imposed, and the material sections upon the matter in contention are the 1st, 2nd, 3rd, and 9th. The 4th section imposes a duty of £1 10s. per cent. upon the average issues of each year ending on the 31st of December, such average issues to be ascertained by adding together the amounts set forth in the several monthly returns for the year, and then dividing the result by twelve.

Sects. 1, 2, 3, and 9 are as follows:—

"1. Every joint stock bank trading as bankers in this Colony and issuing bank-notes shall be bound and obliged to transmit to the Treasurer-General of this Colony monthly returns of the amount of bank-notes in circulation by such bank: Provided that for the purposes of this Act the term 'bank-notes' shall not include bank post bills.

"2. The first return to be made by every such bank under this Act shall state the amount of the bank-notes of such bank outstanding on the last day of September, 1864, and every succeeding return shall state the amount of such notes outstanding on the last day of each succeeding month.

"3. Every such return shall in attestation of its correctness be signed by not less than two directors, and also by the cashier of the bank or person acting as such cashier, and shall be in substance as follows:—

"——— Bank.

"We, the undersigned, do hereby certify that the bank-notes

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of this bank outstanding on the —— 186—, amounted to £——."

Then follows a form of certificate for notes described in the 10th section, about which there is now no question.

A bank-note in circulation ordinarily means a note which is passing from hand to hand as a negotiable instrument representing a certain value. When it is returned to the bank from which it was issued it ceases to circulate. There is no longer any person entitled to require payment from the bank. It may be cancelled or re-issued at the option of the bank. The word "outstanding" used in the 2nd section is still more significant than "in circulation," and points to an engagement or liability of the bank. In principle the bank and its branches are one bank. The qualifications of this rule are stated in *Prince* v. *Oriental Bank* (1), and do not apply to this case. When a bank-note is received at a branch office the effect is the same as if it were received at the head office. The argument for the defendants was mainly founded on the assumption that the branches were intended by the Act to be treated as independent banks. But it does not appear to their Lordships that they are so treated. In the reasons given by the Chief Justice the judgment of the Supreme Court is founded upon the notes having been represented under the Act 19 of 1865 as being in circulation, and on sect. 9 of Act 6 of 1864. Act 19 of 1865 was passed for a different purpose, and cannot, in their Lordships' opinion, be used to shew what is the meaning of the Act of 1864.

Sect. 9 of that Act is as follows:—"As often as any joint stock company carrying on business as bankers in this Colony, whether their chief seat of business shall be in this Colony or elsewhere, shall have in this Colony a head office and one or more branch banks also in this Colony, the monthly returns mentioned in the 1st section of this Act shall be made as follows:—

"1. If the branch bank shall issue its own notes, namely, notes purporting to be issued by or at the place of business of such branch bank, then the returns aforesaid shall be made by such branch bank direct, precisely as if such bank were an independent and unconnected bank and not a branch.

(1) 3 App. Cas. 325.

"2. No such last-mentioned branch bank shall in calculating its bank-notes outstanding, be at liberty to deduct from its circulation any bank-notes of its head office or of any other branch of the same which such branch bank may happen to have on hand.

"3. In like manner no head office of any bank having one or more branches shall, in calculating its bank-notes outstanding, be at liberty to deduct from its circulation any notes of any of its branches which notes such head office may happen to have on hand.

"4. Should there be at any time in this Colony a bank having a head office and one or more branch banks, which branch bank or banks shall not issue any such notes as are in the first subdivision of this section described, then the returns aforesaid shall not be made by or from the branch bank or banks, but by or from the head office, and shall include the whole outstanding circulation of the said bank, including all its branches."

The beginning of the section shews that it is intended by it to direct how the monthly returns mentioned in the 1st section are to be made, and the effect of it is that the head office, and each branch that issues its own notes, is to make a return shewing the state of its own issue. The head office would issue notes through the agency of the branches, and would make the return of the notes thus in circulation. Their Lordships cannot agree with the Chief Justice of the Supreme Court, that the object of the 4th sub-section was to enlarge the basis of the returns. They are of opinion that the defendant's contention ought to have been declared to be correct and judgment recorded for the Bank of Africa, and that the plaintiff should pay the costs of the suit. They will so humbly advise Her Majesty, and that the judgment of the Supreme Court be reversed.

The respondents will pay the costs of this appeal.

Solicitors for appellant: *Johnson, Budd, & Johnson.*
Solicitors for respondent: *Wilson, Bristows, & Carpmael.*

[PRIVY COUNCIL.]

J. C.* 1887 Dec. 14, 15. 1888 Feb. 4.

VICTORIAN RAILWAYS COMMISSIONERS Defendants;

AND

JAMES COULTAS AND MARY COULTAS . Plaintiffs.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Negligence—Nervous Shock resulting from Fright—Damages too remote.

Damages in a case of negligent collision must be the natural and reasonable result of the defendants' act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote.

The Notting Hill (9 P. D. 105) approved.

Where the gate-keeper of a railway company had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical and mental injuries occasioned by the fright:—

Held, that the verdict could not be sustained, and that judgment must be entered for the defendants.

Quære, whether proof of "impact" was necessary to maintain the action.

APPEAL from an order of the Supreme Court (Dec. 14, 1886), entering judgment for the plaintiffs in two several sums of £342 2*s*. and £400, and costs of action. The facts of the case and the proceedings in the action are stated in the judgment of their Lordships.

Cohen, Q.C., and *Gurner* (*Finlay*, Q.C., with them) for the appellants, contended that the damages claimed were too remote. Damages could not be recovered for mental injuries caused by negligent acts of the appellants when there was an absence of all physical damage caused by the appellants' negligence. The liability is for the ordinary and immediate consequences of negligence. A mere nervous shock caused by fright of an impending event which never happens results from the constitution and circumstances of the individual, and does not give a cause of action, to support which there must be physical injury directly

* *Present*:—Lord FitzGerald, Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

resulting from the negligent act or omission. Reference was made to *The Notting Hill* (1); *Huxley* v. *Berg* (2).

Gainsford Bruce, Q.C., and *Archibald*, for the respondents, contended that proof of impact was not necessary to support the action. The negligent acts of the defendants necessarily caused great fright at the serious imminence of a collision. Both physical and mental injuries resulted, and the jury were right in awarding damages therefor. Reference was made to *Jones* v. *Boyce* (3), distinguishable from *Huxley* v. *Berg* (2); *Sneesby* v. *Lancashire and Yorkshire Railway Company* (4). [SIR BARNES PEACOCK referred to *Boyle* v. *Brandon* (5) as to remoteness of damages.] *Hill* v. *New River Company* (6); *Vandenburgh* v. *Truax* (7); *Mortin* v. *Shoppee* (8).

Cohen, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The respondents brought a suit against the appellants in the Supreme Court of the colony of Victoria to recover damages for injuries sustained by the respondent Mary Coultas, through the negligence of a servant of the appellants, and expenses incurred by the respondent James Coultas, her husband, through her illness. The statement of claim stated that, through the negligence of the servant of the defendants in charge of a railway gate at a level crossing, the plaintiffs, while driving over the level crossing, were placed in imminent peril of being killed by a train; and, by reason of the premises, the plaintiff, Mary Coultas, received a severe shock, and suffered personal injuries, and still suffered from delicate health and impaired memory and eyesight. The defendants, by their defence, denied the allegations in the statement of claim, and further said they would contend

(1) 9 P. D. 105.
(2) 1 Stark. 98.
(3) 1 Stark. 493.
(4) 1 Q. B. D. 42.
(5) 13 M. & W. 738.
(6) 9 B. & S. 303.
(7) 4 Denio, Sup. Ct. N. Y. Rep. 464.
(8) 3 C. & P. 373.

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that no cause of action was disclosed by it, as it was not stated that either the plaintiffs or their property were struck or touched by the train of the defendants; and, further, that the alleged damage arising from shock or fright, without impact, was too remote to sustain the action.

The facts proved at the trial before Mr. Justice Williams, a judge of the Supreme Court, and a jury, were that on or about the 8th of May, 1886, about nine in the evening, the respondents, together with John Wilson, a brother of the wife, were driving home in a buggy from Melbourne to Hawthorn, which is near Melbourne. They had to cross a level crossing on the line of railway from Melbourne to Hawthorn. When they came to it the gates were closed, and the gate-keeper came and opened the gates nearest to them and then went across the line to the gates on the opposite side. The respondents followed him, and had got partly on to the up line (the farther one) when a train was seen approaching on it. The gate-keeper directed them to go back, but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He got the buggy across the line so that the train, which was going at a rapid speed, passed close to the back of it and did not touch it. As the train approached Mary Coultas fainted, and fell forward in her brother's arms. The medical evidence shewed that she received a severe nervous shock from the fright, and that the illness from which she afterwards suffered was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to nervous shock.

The jury found that the defendants' servant negligently opened the gate and invited the plaintiffs to drive over the level crossing when it was dangerous to do so, and that the plaintiffs could not have avoided what had occurred by the exercise of ordinary care and caution on their part. And they assessed the male plaintiff's damages at £342 2*s.*, and the female plaintiff's at £400, leave being granted to either side to move for judgment after the full Court had decided points reserved. The points reserved were:—

1. Whether the damages awarded by the jury to the plaintiffs, or either of them, are too remote to be recovered?
2. Whether proof of "impact" is necessary in order to entitle plaintiffs to maintain the action?
3. Whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendants?

The full Court, consisting of Mr. Justice Williams, and two other judges, answered that the damages awarded were not too remote to be recovered; that proof of "impact" was not necessary; and that the female plaintiff could recover damages for physical and mental injuries occasioned by the fright. Thereupon judgment was entered for the plaintiffs for the amounts awarded, and the present appeal is from that judgment. The defendants did not move for a new trial, and consequently they cannot now contend that there was contributory negligence on the part of the plaintiffs.

The rule of English law as to the damages which are recoverable for negligence is stated by the Master of the Rolls in *The Notting Hill* (1), a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act. The law would be the same in Victoria unless it has been otherwise enacted by the legislature, which it is not said it has been.

According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account

(1) 9 P. D. 105.

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of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English Courts in which, upon such facts as were proved in this case, damages were recovered. The decision of the Supreme Court of New York which he referred to in support of his contention was a case of a palpable injury caused by a boy, who was frightened by the defendant's violence, seeking to escape from it, and is like the case of *Sneesby* v. *Lancashire and Yorkshire Railway Company* (1). It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants. They will therefore humbly advise Her Majesty to reverse the judgment for the plaintiffs, and to order judgment to be entered for the defendants, with the costs of the action and of the argument of the points reserved and the motion for judgment. The respondents will pay the costs of this appeal.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondents: *W. Martin, Flegg & Son.*

(1) 1 Q. B. D. 42.

[PRIVY COUNCIL.]

OSBORNE AND OTHERS . . . . . PLAINTIFFS; J. C.* 1888

AND

MORGAN, HALL AND D'ARCY . . . . DEFENDANTS. *Jan.* 11, 12, 13; *Feb.* 4.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Law of Queensland—Gold Fields Act, 1874, *ss.* 9, 11—*Holders of Miners' Rights —Rights of Crown Lessees.*

In an action by the holders of "miners' rights" issued to them under the Gold Fields Act 1874 and regulations made thereunder, to set aside the defendants' mining leases also thereunder granted on the grounds (1) that they had been granted contrary to sect. 11 within two years from the proclamation of the goldfield within which the leased areas were contained; (2) that the formalities prescribed by the regulations had not been observed by the defendants when applying therefor:—

Held, that neither under the Act nor otherwise had the plaintiffs any right to interfere with the lessees' possession. Sect. 9 gave them no rights whatever as against lands let by the Crown, and no title to try the validity of Crown leases relating thereto; and the whole tenor of the regulations is opposed to such contention.

CONSOLIDATED APPEAL from a judgment of the Supreme Court (March 5, 1886) ordering that judgment be entered for the respondents on their demurrer to the appellants' statement of claim.

The statement of claim alleged, that the respondents were carrying on mining operations on certain Crown lands situate in the Crocodile Creek Goldfield and claimed to be entitled to carry on such operations by virtue of two gold mining leases dated February, 1884, purporting to be granted by the Governor under the provisions of the Gold Fields Act, 1874; that the said goldfield was proclaimed a goldfield within the meaning of the said Act on the 20th day of September, 1883; that the leases were granted within two years of the date of the proclamation of the goldfield, and that the respondents Morgan and Hall in making application for the leases did not comply with the regulations in force

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN and SIR BARNES PEACOCK.

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applicable to leases; with separate and other allegations against D'Arcy.

The appellants claimed a declaration that the said leases were invalid; that the appellants were entitled to occupy for mining purposes the portion of Crown lands described in the statement of claim; an order directing the respondents to deliver up to the appellants possession of the said portion of Crown lands; and an injunction restraining the respondents from carrying on mining operations thereon, and from obstructing the appellants in entering thereon for the purpose of taking possession thereof under and by virtue of miners' rights.

The respondents Morgan and Hall delivered a statement of defence and they also demurred to the statement of claim on the grounds (among others), that it did not appear therein that the appellants ever were in possession of the said portion of Crown lands or ever fulfilled the conditions of the said Act and the regulations thereunder necessary to entitle them to occupy the said portion for mining purposes, and that any irregularity in the preliminary proceedings before the issue of the said leases did not invalidate them as against the appellants.

The respondent D'Arcy separately defended.

The facts and proceedings are stated in the judgment of their Lordships.

The judgment of the Supreme Court was to the effect that if the action was to be treated as one of trespass the appellants could not recover, because in such an action the plaintiff must have actual possession and not merely a right to enter, and the appellants had never been in possession of the land in question; and that if it was to be treated as one for the recovery of land the appellants could not recover, because the plaintiff in such an action must recover by the strength of his own title and not on the weakness of that of the defendant, and the appellants not having taken up the land as a claim in the manner prescribed by the regulations or in any other manner, had no better title to the land than any other holders of miners' rights.

Rigby, Q.C., and *Romer*, Q.C. (*J. D. Wood* with them), for the appellants, contended that the leases to Morgan and Hall were

invalid. The only authority which the Crown had to grant them was derived from the Gold Fields Act, 1874 (38 Vict. No. 11), and the Crown must follow that statutory authority strictly. Under that Act (see sect. 11) it had no power to grant the leases within two years after the date of the proclamation of the goldfield in which the land comprised in them is situate. Nevertheless the Crown granted them, but the grant was ultra vires, and the leases themselves were void ab initio. The Crown could not sue upon them. Further than that the lessees had not complied with the statute, and did not observe the regulations relating to applications for leases. Therefore the de facto occupation by the respondents was unlawful as against the appellants. The appellants, on the other hand, had an express statutory right to go on the land. As holders of miners' rights they were entitled to take possession of the land and occupy it for mining purposes: see the express terms of sect. 9. Reference was made to *Blackwood* v. *London Chartered Bank of Australia* (1); *Cooper* v. *Whittingham* (2); *Mulcahy* v. *The Wallhalla Gold Mining Company* (3); *Whitely* v. *Schlemm* (4); *Finnegan* v. *Wissing* (5). [SIR BARNES PEACOCK:—The rights of the Crown being reserved by the Act (see sect. 4) has the holder of a miner's right any power to turn out the Crown's lessee if the Crown is unwilling?] The Crown is bound in so far as is therein "expressly enacted." [LORD WATSON referred to sect. 15. The statute refers to special cases of forfeiture, and provides for them by certain sections. Your case is not one of those, and therefore in your case the Crown is not bound.] Reference was made to *Alcock* v. *Cooke* (6); *Aladdin Gold Mining Company* v. *Aladdin and Try Again United Gold Mining Company* (7); *Sheriff* v. *Coates* (8). See also *Nugent* v. *Mate* in the appendix to Watkin's Crown Lands Act (9); *Beavan* v. *Rigby* (10); *Barlow* v. *Hayes* (11).

(1) Law Rep. 5 P. C. 92.
(2) 15 Ch. D. 501, 506.
(3) 5 Wyatt, Webb and A'Beckett's Rep. Eq. 103; S. C. 40 L. J. (N.S.) (P.C.) 46.
(4) 8 Vict. L. R. (Mining) p. 58.
(5) 4 Austr. Jurist. 65.
(6) 5 Bing. 340.
(7) 6 Wyatt, Webb and A'Beckett, 266.
(8) 1 Russ. & My. 159.
(9) 8 Sup. Court Rep. N. S. Wales p. 246.
(10) 2 Vict. L. R. (Mining) 7.
(11) 4 Wyatt, Webb and A'Becket (Mining), 67.

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The Attorney-General (Sir *Richard Webster*) and Sir *Horace Davey*, Q.C. (*Nalder* and *J. G. Wood* with them), for the respondents, contended that the judgment of the Supreme Court was right. The appellants were not entitled to the lands in suit. They did not allege any title or any legal or equitable right. They did not allege that they were or ever had been in possession. Their position was that they were mere licensees of the Crown for purposes strictly defined by the Acts and regulations referred to. Such a license was not sufficient to enable them to maintain this suit. See *Doe* v. *Wood* (1); *James* v. *Young* (2). Whatever remedy they have is given by the statute from which they derive their right. The lands in suit are not "unoccupied Crown lands" within the meaning of the Acts and regulations; and therefore the plaintiffs as holders of miners' rights have no right to occupy them. If the construction of the Act were open to any doubt on this point, the 5th regulation is clear as to the extent of the miners' right; and the 7th regulation prescribes the only mode in which he can assail lands which are in the de facto occupation of third parties holding under the Crown. And as regards the leases of the respondents, the alleged irregularities in the proceedings under which they were granted would not render them void or voidable, even at the suit of the Crown, much less could the appellants take advantage of such irregularities against the wish of the Crown, or against persons holding the lands with the consent of the Crown. The holders of miners' rights are not without their remedy. They can bring an information or a writ of intrusion: *The Queen* v. *Hughes* (3). But they cannot maintain a suit like this. Reference was made to sects. 10, 11, 29, 30, 31, and 35 of the Act, and to the 46th and 81st regulations. Further the Warden's Court or the justice of the peace appointed by the Governor to discharge the duties of warden has exclusive jurisdiction over the subject of this action. See sects. 52, 53, and 54. The cases cited on the other side from the Colonial Courts support this view, and with respect to *Alcock* v. *Cooke* (4) see the observations of Lord Selborne (5).

(1) 2 B. & Ald. 724.
(2) 27 Ch. D. 652.
(3) Law Rep. 1 P. C. 81.
(4) 5 Bing. 340.
(5) 9 App. Cas. 940.

Rigby replied.

1884. Feb. 4. The judgment of their Lordships was delivered by

LORD WATSON:—

This is an action instituted by the appellants before the Supreme Court of Queensland, for the purpose of obtaining a judicial declaration that two gold mining leases of areas within the Crocodile Creek goldfield, granted by the Governor of the Colony on behalf of Her Majesty to the respondents Morgan and Hall, are "invalid and void." That is the leading conclusion in the appellants' statement of claim; and upon it the controversy between the parties turns. There are other conclusions for giving the appellants possession of certain portions of the leasehold areas in question; but these are consequential merely, and depend upon the affirmance of the appellants' right to have the leases declared null.

The appellants, who are twenty in number, allege no title to insist in the action, beyond the fact that each of them is the holder of a document, known as a "miner's right," issued to him by the warden of the Crocodile Creek goldfield, pursuant to the provisions of the Gold Fields Act, 1874, and regulations made in terms thereof by the Governor and Council. The leases which they challenge profess to have been granted in conformity with the provisions of the same statute.

The general policy of the Act, which was passed by the legislature of Queensland, and received the royal assent upon the 21st of July, 1874, is to encourage gold mining within the colony, by giving a certain fixity of tenure to all persons who are willing, either by virtue of a "miner's right" or under a lease from the Crown, to occupy Crown land for that purpose, and to work efficiently and continuously. The Governor is accordingly empowered (sect. 21) to proclaim any portion of Crown land to be a goldfield; and, when that has been done, sect. 23 enacts that the proclaimed field "may be mined in, used, and occupied, according to the provisions of this Act and the regulations." The duty of framing regulations is (sect. 97) committed to the Governor and his Council, subject to this condition, that they are

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not to be contrary to the Act, but such as may be necessary for giving effect to its provisions, and for the management of the goldfields generally. By sect. 2 "Crown lands" are defined as meaning (except when the context otherwise requires) "all lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted in fee, or lawfully contracted to be so granted, or which are not under lease for purposes other than pastoral purposes." It is important to observe that this negative definition is not limited to the state of occupation existing at the time when a goldfield is proclaimed; so that lands let on lease by the Crown for mining purposes in pursuance of its provisions cease, whilst they are so demised, to be "Crown lands" within the meaning of the Act.

"Miners' rights" are documents in the nature of a license, which are issued by the warden of a goldfield, under the authority of the Governor (sect. 6), to any person applying for the same, and may be kept in force for then ten years, by his making an annual payment of the same amount during that period. The document, of itself, creates no interest in any part of the goldfield, either legal or equitable; but the effect given to it by the statute and regulations is, that, when the holder has, in virtue of it, lawfully occupied, and duly worked in quest of gold, a certain area of Crown land within the limits of the goldfield (called a "claim"), he thereby acquires a right to remain in undisturbed occupation of the claim, and an absolute proprietary right to all the gold which it contains, these rights being indefeasible, unless forfeited by his contravention of the Act or of the statutory regulations. Sect. 2, which defines the expression "claim" for the purposes of the Act, contains the proviso, "that no land comprised in any lease granted for mining purposes shall be deemed to be a claim."

The rights of lessees are regulated by sects. 10 to 16 inclusive. It is thereby made lawful for the Governor to grant to any person a lease of Crown lands for mining purposes, not exceeding twenty-five acres, for any term not exceeding twenty-one years, at the yearly rental of one pound per acre; but it is expressly provided that such lease shall in no case include Crown land occupied, for mining purposes, by the holder of a miner's right, unless with his

consent. Sect. 12 requires that every lease shall contain a stipulation that, if the lessee fail to fulfil its conditions, or to use the land bonâ fide for the purpose for which it is demised, the lease shall be voidable at the will of the Governor. Sect. 16 enacts that a lease may be surrendered at any time, with the consent of the Governor in Council, if its conditions have been fulfilled by the lessee, so far as the time which has elapsed will permit.

It will be observed that the statute gives to the Governor the power of determining according to his discretion whether a lease ought or ought not to be voided, in respect of the lessee's failure to observe its conditions, or to use the land for the purposes for which it was demised to him. But art. 84 of the Regulations makes special provision with regard to the extent of working required of the lessee, during the dependence of his application for a lease, and after he has received intimation that it will be granted. Failure to comply with its provisions entails forfeiture of his right, whether the lease has been issued or not; and art. 89 farther provides that "any miner giving notice to the warden of a goldfield that a leasehold, or ground held under an application for a lease, is not being worked in accordance with these regulations, and applying for the forfeiture thereof, shall, in the event of such leasehold being forfeited, have a preferent right, for seven days after the forfeiture, to take possession of the ground so forfeited as a claim, or to apply for the same as a leasehold." It was undoubtedly within the competency of the Governor, by means of a regulation framed with the assistance of his Council, to confer that privilege upon the holder of a miner's right, assuming that the latter had not, under the Act, a personal title to insist in the forfeiture of the leasehold.

The two leases which are assailed in the present action were granted by the Governor of the Colony, in the name of Her Majesty, on the 21st of February, 1884, professedly in terms of the Gold Fields Act, 1874, for the full term of twenty-one years from the 1st day of December, 1883. They each contain an acknowledgment that the first year's rent had been paid in advance. They also contain a variety of conditions with regard to the mode of working the mines, keeping them in proper repair and preservation, and also a clause providing for their

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avoidance at the will of the Governor in terms of sect. 12 of the Act.

Seeing that the respondents have chosen to plead by way of demurrer, the facts of the case must, for the purposes of this appeal, be taken to be as stated by the appellants. They do not dispute that, at the time when their writ was issued (which appears to have been about the end of September, 1885), the respondents were and had all along been in possession of the lands demised to them, and were recognised by the Crown as its tenants. Nor do they allege that the respondents had been guilty of any breach of the terms of the leases, or of the conditions imposed by the regulations. The grounds upon which they ask a declaration of the nullity of the leases are, (1st) that they were granted by the Governor within two years from the date of the proclamation of the Crocodile Creek goldfield (which is said to have been the 20th of September, 1883) contrary to the provisions of sect. 11 of the Act; and (2nd) that, in the applications for the leases certain formalities prescribed by the regulations were not observed. Their Lordships venture to doubt whether, having regard to the terms of the leases themselves, and to the possession which has followed upon them, the alleged omission of these formalities would afford a relevant ground for annulling the leases, even at the instance of the Crown. But they are willing to assume (without indicating any opinion upon the point) that, taken by itself, and apart from other considerations, the fact of a lease having been granted within two years from the time when the goldfield was first proclaimed is sufficient to render it voidable at the instance of any person who has, in law or equity, a right to set it aside.

It does not seem to admit of doubt that the Crown would have a good title to challenge the validity of these two leases, upon the first ground advanced by the appellants, either by means of a writ of intrusion or by an information in Chancery. In a suit of that kind, it would be open to the lessees to plead in defence, all acts of the Crown inferring recognition of their leasehold right; and in any view, the plaintiff could not obtain judgment, except on the footing of making, so far as practicable, restitutio in integrum. The Crown could not, in the event of success,

retain rents paid by the tenants, if they had made outlays useful and necessary, though as yet unremunerative, for the purpose of mining gold within the areas demised to them; and would probably be held liable to reimburse them for these outlays, so far as available for future working. But the appellants assert their right to terminate the leases, and to dispossess the lessees, not only without the aid, but against the wish of the Crown. They concede that no decree which they can obtain in this action could operate as res judicata between the lessees and the Crown; and it is obvious that their contention, if well founded, will be productive of very singular results. On that supposition, the lessees may have so conducted themselves that they cannot withdraw from their contract obligations: and the Crown may have so ratified the contract that it cannot disturb the possession of its lessees; yet any one or more persons holding a miner's right may avail themselves of an original flaw in the lease, at any time during its currency. They may delay their challenge until the lessees have, on the faith of the lease, spent large sums of money in preparing the land for mining operations, and may then intervene and appropriate the whole benefit of such expenditure, without the lessees being entitled either to repetition of the rents which they have paid, or to compensation for their beneficial outlay. That may be a necessary, but it can hardly be described as a just, consequence of the statutory privileges implied in a miner's right.

The right to interfere with the possession of a tenant under a formal lease, independently of the lessor, and in derogation of his rights, is not one of the natural incidents of a mere license, which carries no legal or equitable interest in the soil. An ex facie regular lease, followed by possession, and impeachable only upon such extrinsic grounds as are alleged in the appellants' declaration, is, as between the parties to it, not void but voidable; and, the lessees being willing to continue in possession and to comply with its stipulations, it is the privilege of the lessor to determine whether they shall be permitted to do so or not. The lessees are not liable to ejectment, except in a suit brought at his instance or with his concurrence. In the present case, the rights and privileges of the lessor are so far protected by sect. 10

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of the Gold Fields Act, 1874, which provides that nothing in the Act contained "except so far as is herein expressly enacted, shall be deemed to abridge or control the prerogative rights and powers of her Majesty in respect of gold mines." It was accordingly conceded in the argument for the appellants that, if the Statute of 1874 has not given them the right which they assert, either expressly or by plain implication, they have no title to maintain this action.

The appellants relied upon the terms of sect. 9 as conclusive in their favour. It enacts that any person who shall be the holder of a miner's right shall, "subject to the provisions of this Act, and to the Regulations, be entitled (except as against her Majesty) to take possession of mine and occupy Crown lands for mining purposes." Lands which are in actual occupation as a claim do not cease to be Crown lands within the definition of the Act; and it has already been pointed out that sect. 9 gives the occupant an absolute and exclusive interest in his claim, so long as he complies with the statute and the regulations. The words upon which the appellants rely cannot, therefore, be construed as giving the holder of a miner's right license to occupy any Crown land which he may choose to select, but must signify Crown lands not yet occupied as claims. That is made abundantly clear by art. 5 of the Regulations, which prescribes the method by which the holder of a miner's right may lawfully take up a claim. It provides that "a miner may take up and work any *unoccupied* Crown land as a claim by fixing firmly in the ground at each corner thereof a post four inches in diameter," &c. Again, art. 7 gives him the right, when a claim has become liable to forfeiture, to apply to the warden to give him possession of such claim, but that is a right against Crown lands which must be followed out and enforced in the manner prescribed by the regulations.

Lands let by the Crown for gold mining purposes, whether before or after the proclamation of a goldfield, are not Crown lands within the meaning of the Act of 1874, and against these sect. 9 gives no right whatever to the holder of a miner's license. That is hardly disputed by the appellants, but they contend that the provisions of sect. 9 give them a title to try the validity of

leases bearing to be granted by the Governor in terms of the statute, in a question with the lessees, and in the absence of the Crown, with the view of restoring the areas let to the category of Crown lands. It appears to their Lordships that the Act does not, expressly or by necessary implication, confer any such right. It is, in their opinion, sufficient to exclude the holder of a miner's right that the land is de facto occupied in virtue of a lease granted and recognised by the Crown. Their Lordships do not doubt that, in cases where reasonable grounds can be shewn for interfering with the lessee's possession, the Crown will lend its assistance in terminating the lease, and that it will refuse its aid to any attempt to disturb his possession merely for the purpose of giving the holders of miners' rights the benefit of his outlay and operations.

The whole tenor of the regulations is opposed to the inference that miners' right holders have a title to impeach possession held under a gold mining lease. It is only in one event, that of the lease becoming liable to forfeiture through breach of the regulations, that the miner is allowed to intervene at his own hand. Sect. 46 of the Regulations, no doubt, provides that "any person being in unauthorized occupation of Crown lands on any proclaimed goldfield may be summarily removed therefrom by order of the warden, and any person resisting or obstructing the carrying out of any such order, shall be liable to a penalty not exceeding ten pounds." The sole object of that regulation is to give the warden the power of summarily ejecting occupants who can shew no title of possession, or whose title has been found, in a competent proceeding, to be insufficient or void. It has no application to the case of an occupant who has a colourable title from the Crown.

In these circumstances their Lordships have come to the same conclusion, although not for the same reasons, as the Court below. If the Statute of 1874 had given to the owner of a mining license a right to challenge and set aside leases as being contrary to its provisions, without excluding the jurisdiction of the Supreme Court, their Lordships are not disposed to hold that the appellants could have had no remedy in this suit, because the ordinary forms of action, for recovering possession of

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Crown land, require the plaintiff to have an interest in the land, which a miner's right is incapable of conferring.

A great deal of the respondents' argument was directed to the point that the warden and his Court had exclusive jurisdiction to entertain, in the first instance, a claim of the nature of that preferred by the appellants. Seeing that, in the opinion of their Lordships, the Act gives no right to sue, it is unnecessary to consider to which tribunal jurisdiction would have belonged if such a right had existed.

Their Lordships will humbly advise her Majesty to affirm the orders appealed from of the Supreme Court of Queensland, and to dismiss these consolidated appeals. The appellants must pay to the respondents their costs of these consolidated appeals.

Solicitor for appellants: *A. C. Curtis Hayward.*
Solicitors for respondents: *W. & T. Flower & Nussey.*

[PRIVY COUNCIL.]

J. C.* 1888 Jan 17; Feb. 4.

WILLIAMS . . . . . PLAINTIFF;

AND

MORGAN, HALL, AND PATTISON . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Law of Queensland—Gold Fields Act, 1874, *ss.* 9, 11—*Holders of Miners' Rights —Rights of Crown Lessees.*

In an action for substantially the same purpose as in the last preceding case, but with the additional allegation that the plaintiff had before action with the view of fortifying his title gone to the leasehold area for the purpose of taking possession of parcels of ground within it, and of working them as claims, but was prevented by the defendants:—

Held, that this made no difference, as such proceedings were unauthorized by the Act, and could not set up a defective title.

APPEAL from a judgment of the Supreme Court (June 11, 1886), allowing the respondents' demurrer to the appellants' statement of claim.

* *Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR BARNES PEACOCK.

The question in this appeal was substantially the same as in the last, viz., whether the appellants had alleged any right or title to possession of the lands in suit or to oust the respondents therefrom.

Rigby, Q.C., and *Young*, for the appellants.

Sir *Horace Davy*, Q.C., and *J. G. Wood* (*The Attorney-General* with them), for the respondents.

Reference was made to *The Queen* v. *Cribb* (1); *Wakeham* v. *Cobham* (2); *Hollyman* v. *Noonan* (3).

The judgment of their Lordships was delivered by

LORD WATSON:—

This is another action brought by a mining right holder against a mining lessee; and it involves the same general question under the Queensland Gold Fields Act of 1874 which was disposed of in the preceding case. The main point of difference between the two cases is that, in the present, the plaintiff, before bringing his action, with the view of fortifying his title, went to the lease-hold area for the purpose of taking possession of four several parcels of ground within it, and working them as claims, but was obstructed by the defendants, and so prevented from attaining his object. The Court below, holding that these four parcels, as described in his declaration, exceeded the extent of land which the plaintiff was entitled to occupy as a claim, decided against him on the authority of *The Queen* v. *Cribb* (1). In that case the Court refused to issue a mandamus to compel the warden of the Crocodile Creek goldfield to register as a claim a piece of ground which exceeded the limits specified in the statutory regulations. Their Lordships see no reason to doubt the soundness of the decision in *The Queen* v. *Cribb* (1); but it appears to them that the preliminary proceedings taken by the appellant were unauthorized by the statute, and could not have the effect of setting up his defective title; so that his case falls within the rule

(1) Queensland L. J. vol. ii. p. 159. (2) 1 Vict. Rep. M. 34.
(3) 1 App. Cas. 595.

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already laid down by them. Their Lordships will, therefore, humbly advise Her Majesty to affirm the order appealed from, and to dismiss the appeal. The costs of the appeal must be paid by the appellant.

Solicitors for appellants: *Walker, Martineau, & Co.*
Solicitors for respondents: *W. & J. Flower & Nussey.*

[HOUSE OF LORDS.]

JOHN PRITCHARD . . . . . APPELLANT;

AND

THE MAYOR, ALDERMEN, AND CITIZENS OF THE BOROUGH OF BANGOR } RESPONDENTS.

H. L. (E.) 1888 March 6.

Municipal Corporation—Election of Councillor—Disqualification—Alderman—Returning Officer—Declaration of Election—Return of Minority Candidate—Mandamus—Ballot Act 1872 (35 & 36 *Vict. c.* 33) *s.* 2, *Sched.* 1, *rr.* 45, 46—*Municipal Corporations Act* 1882 (45 & 46 *Vict. c.* 50) *ss.* 34, 58, 87.

Two candidates, R. and P., were nominated for the vacant office of councillor of one of the wards of a borough. P. objected to R.'s nomination on the ground that R. was disqualified, being an alderman of the borough whose term of office had not expired, but the mayor disallowed the objection. Throughout the election P. insisted upon his objection, and claimed to be elected whatever the result of the poll might be. The votes having been counted shewed a majority for R., and the returning officer read out the names and numbers to the mayor, who announced them in public. Having taken time to consider the objection the returning officer on the following day issued a public notice stating the number of votes given to each candidate, and the objection, and declaring P. to be duly elected. P. thereupon made and subscribed the declaration of acceptance of the office required by the Municipal Corporations Act 1882 ss. 34, 35. R. subsequently made and subscribed a similar declaration:—

Held, affirming the decision of the Court of Appeal (18 Q. B. D. 349) but without deciding whether an alderman is disqualified for election as councillor, that the returning officer had no jurisdiction to determine the question of disqualification, the proper method for determining that question being an election petition as provided by the Municipal Corporations Act 1882 s. 87, and the duty of the returning officer being to count the votes and "forthwith to declare to be elected the candidate to whom the majority of votes have been given," as provided by s. 2 of the Ballot Act 1872; that P. had not been declared to be elected; that the office was not full of him; and that he was not entitled to a mandamus to compel the mayor and corporation to receive his votes at their corporate meetings.

Reg. v. *Coaks* (3 E. & B. 249; 23 L. J. (Q. B.) 133) discussed.

APPEAL from a decision of the Court of Appeal, reported as *Reg.* v. *Mayor and Corporation of Bangor* (1).

The following facts appeared from the affidavits:—

On the 23rd of October 1886 Pritchard (the appellant) and

(1) 18 Q. B. D. 349.

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Meshach Roberts were nominated as candidates for the vacant office of councillor for the South Ward of the borough of Bangor. Roberts was then an alderman for the borough, and his term of office would in ordinary course expire on the 9th of November following. On the 25th of October the mayor of the borough attended at the council chamber to decide upon the validity of objections to the nominations, and Pritchard objected to the nomination of Roberts on the ground that being an alderman whose term of office had not yet expired he was ineligible for the office of councillor. The mayor disallowed the objection.

On the 1st of November the election took place, Alderman Platt having been duly assigned to act as returning officer. Before, during, and after the poll Pritchard renewed and continued his objection to the eligibility of Roberts and claimed to be elected whatever the result of the poll might be. There was some evidence to shew that some of the electors were aware of the fact that Roberts was an alderman and that he was alleged to be disqualified on that ground.

When counted in the Masonic Hall in the presence of the returning officer the votes were found to be thus:—Roberts, 171; Pritchard, 151. The returning officer read out to the mayor the numbers for each candidate, and (as he alleged in his affidavit) immediately went away without declaring any candidate to be elected, in order to consider the objection. The mayor went outside the building and announced to the public the number of votes recorded for each candidate.

On the 2nd of November the returning officer having considered the objection and been shewn an opinion of counsel came to the conclusion that Roberts was disqualified, and issued, as a public notice of the result of the election, a placard in which —after stating the number of votes given to each candidate, and that Pritchard had claimed to be declared elected on the ground that Roberts was an alderman and therefore not qualified, and that he held the claim to be well founded—the returning officer declared Pritchard to be duly elected as councillor for the South Ward.

On the 3rd of November in pursuance of a notice from the town clerk Pritchard accepted the office by making and subscribing

the declaration required by the Municipal Corporations Act 1882 ss. 34, 35.

On the 9th of November Pritchard attended a meeting of the council and claimed to vote at the election of mayor and in other matters, but the mayor refused to receive and rejected his vote. At the same meeting, and immediately after the election of mayor (at which he voted as alderman) Roberts accepted the office of councillor by making and subscribing the declaration required by the Municipal Corporations Act 1882 ss. 34, 35.

A writ of mandamus having been applied for by Pritchard on the 22nd of November, the Queen's Bench Division (Denman and Stephen JJ.) eventually made an order absolute for a peremptory mandamus to the mayor and corporation of Bangor commanding them to receive and count Pritchard's vote at the corporate meetings of the council. The Court of Appeal (Lord Esher M.R. and Lindley and Lopes L.JJ.) reversed that decision and quashed the mandamus (1).

The present appeal was twice argued; first on the 2nd, 4th, 5th, 8th and 9th of August 1887 by Sir *E. Clarke* S.G. and *M. Douglas* for the appellant, and Sir *C. Russell* and *R. S. Wright* for the respondents, before Lord Halsbury L.C. and Lords Watson, FitzGerald and Macnaghten.

It was afterwards ordered to be re-argued by one counsel of a side before the same noble and learned Lords and Lord Herschell.

1888. March 5, 6. *Malcolm Douglas* (Sir *E. Clarke* S.G. with him) for the appellant:—

The appellant is entitled to a mandamus. The important question in the case is whether an alderman is disqualified for election as councillor, and the appeal is brought to obtain a final decision on that point. That an alderman was disqualified for election as councillor under the Municipal Corporations Act 1835 was decided in *Reg.* v. *Coaks* (2). It may be said that the special verdict in that case found as a fact that Blake being an alderman was disqualified, and that the Court assumed that fact as the basis of their decision. But a search in a local newspaper

(1) 18 Q. B. D. 349. (2) 3 E. & B. 249; 23 L. J. (Q.B.) 133.

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(*Norwich Mercury*) of the period has disclosed the following circumstances:—A rule nisi for a quo warranto against Blake having been granted, Sir Alexander Cockburn and Willes shewed cause. Sir A. Cockburn after stating that Blake was on the 1st of November 1851 elected a councillor of the fourth ward of the city of Norwich, being at the time of election an alderman of the city, said he "was afraid he should have great difficulty in convincing their Lordships that the two offices were compatible, and that Mr. Blake had been duly elected." "The Court intimated that they thought an alderman not having divested himself of the office could not be elected a councillor." "Sir A. Cockburn therefore said he should decline to trouble the Court with any arguments upon the point;" and as appears from the entry book of rules, Queen's Bench, Crown side, the rule was made absolute on the 7th of May 1852, on the ground of Blake's disqualification. The information having been filed, Blake disclaimed and judgment of ouster was signed against him (1). That case is therefore an authority that an alderman was not eligible as councillor. The result is the same under the Municipal Corporations Act 1882 sects. 11, 12. If a man could be both alderman and councillor the number of the council would not be complete. If an alderman could vacate his office by accepting the office of councillor he would escape the duties imposed by the statute and the penalties given for enforcing those duties: see sects. 34–36 of the Municipal Corporations Act 1882. There is only one way of vacating an office and that is provided by those sections, viz. paying the fine. The electors having had notice that Roberts was disqualified for election the votes for him were thrown away, and Pritchard, the minority candidate, was elected. There is abundant authority for this: *Reg.* v. *Ledgard* (2); *R.* v. *Hawkins* (3); *Reg.* v. *Coaks* (4); *Gosling* v. *Veley* (5); *Reg.* v. *Blizard* (6); *Reg.* v. *Mayor of Tewkesbury* (7); *Drinkwater* v. *Deakin* (8); *Trench* v. *Nolan* (9). It was the duty of the returning officer to give

(1) 3 E. & B. 251; 23 L. J. (Q.B.) 133.
134.
(2) 8 A. & E. 535.
(3) 10 East, 211.
(4) 3 E. & B. 249; 23 L. J. (Q.B.)
(5) 7 Q. B. 406, 438.
(6) Law Rep. 2 Q. B. 55, 57.
(7) Law Rep. 3 Q. B. 629.
(8) Law Rep. 9 C. P. 626.
(9) 6 Ir. Rep. Com. L. 464.

effect to the objection and declare Pritchard to be elected, as he did on the 2nd of November. He made no declaration at the close of the poll and Roberts never was declared to be elected. The mayor, no doubt, had no jurisdiction to determine the question of disqualification: *Howes* v. *Turner* (1). But the returning officer has a discretion, and it would be highly inconvenient in some cases if he had not. Suppose the mayor received the nomination paper of a woman or an infant and there were no other candidate, it would be the duty of the returning officer to declare the only candidate not to be elected. In the *Flintshire Case* (2), the majority candidate was notoriously a minor, and the committee of the House of Commons resolved that he was not duly elected, and that his election and return were vexatious, and that the sheriff ought to have returned the minority candidate. See also Roe on Elections p. 793; and Rogers on Elections (14th ed.) p. 691, and the cases there cited.

[*R. S. Wright* for the respondents referred to the *Denbigh Case* cited in a note to the *Middlesex Case* (3), where the sheriff was committed to Newgate for returning the minority candidate.]

The duties of a returning officer are judicial, not merely ministerial; he has a discretion to allow objections not originated by him, per Patteson J. in *Reg.* v. *Ledgard* (4); *Reg.* v. *Owens* (5); *Reg.* v. *Mayor of Tewkesbury* (6); *Fanagan* v. *Kernan* (7). This was so (as shewn by the above authorities) before the Municipal Corporations Act 1882. They are of the same character under that Act and the Ballot Act Act 1872, s. 2, sched. 1, rr. 45, 46. The returning officer having declared Pritchard to be duly elected, he was elected, and as he accepted the office by making and subscribing the declaration under the Municipal Corporations Act 1882 s. 34 the office is full, and the election cannot be questioned except in the proper manner, i.e. by an election petition under sect. 87 of that Act. Before that Act the only mode of questioning it was by quo warranto, the office being full: *R.*

(1) 1 C. P. D. 670.
(2) 1 Peckwell, 526.
(3) 2 Peckwell, at p. 374.
(4) 8 A. & E. 535, 545.
(5) 2 El. & El. 86, 91.
(6) Law Rep. 3 Q. B. 629.
(7) 8 Law Rep. Ir. 44.

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v. *Mayor of Winchester* (1); *Reg.* v. *Derby* (2); *Frost* v. *Mayor of Chester* (3). Roberts had ample time to bring an election petition. The office being full of Pritchard, mandamus is his proper remedy for rejection from the council: *Reg.* v. *Mayor of Leeds* (4). The writ was made peremptory at the instance not of the appellant but of the Queen's Bench Division, but if this House considers that there ought to be a return to the writ the order can be varied accordingly.

R. S. Wright (Sir *C. Russell* Q.C. with him) for the respondents was not heard.

LORD HALSBURY L.C.:—

My Lords, notwithstanding the extremely able and learned argument of the counsel for the appellant, there is a preliminary point which will enable your Lordships to dispose of this case without inquiring into some interesting and important questions which it is not necessary, and therefore it would be improper, for your Lordships to dispose of.

I cannot forbear from saying that the form in which it has been sought to have this case decided is singularly inappropriate for arriving at a conclusion. In cases where the remedy of mandamus was applicable, and the persons to whom it was directed had an opportunity of making a return, the return might be questioned either upon insufficiency in law or by traversing questions of fact raised upon the return, and upon those questions of fact being determined, the whole matter upon the record might be made the subject of proceedings in error. But a proceeding of this kind in which in the first instance there is a peremptory mandamus issued, to which there can be no return except that of obedience to the writ, is absolutely inappropriate where questions of fact are still in debate. It is obvious that if some of the matters which are in contest between the learned counsel had been in question the appropriate tribunal to decide those questions of fact would be a jury, who would receive oral evidence and give their verdict.

(1) 7 A. & E. 215.
(2) 7 A. & E. 419.
(3) 5 E. & B. 531; 25 L. J. (Q.B.) 61.
(4) 11 A. & E. 512.

But I think there is a more serious objection than that of the mere inappropriateness of this remedy, by reason of the provisions of the Municipal Corporations Act of 1882. By the 87th section of that Act the election of any person may be questioned on the ground that he "was at the time of the election disqualified," which is one of the objections made here; or again on the ground "that he was not duly elected by a majority of lawful votes"—that also is a question which has to be determined here if the question is to be ultimately determined in the way the appellant seeks that it should be. And the section goes on to say that those questions may be raised upon an election petition, and in no other manner. This undoubtedly is an effort to question a municipal election by means of mandamus. Now it is remarkable enough that the framers of this statute have dealt with a mandamus, but in this way. They say in sect. 225 that "an application for an information in the nature of a quo warranto against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified *after* election." This provision is so worded because the framers of the section had of course in their minds that they had already by the 87th section prevented any application for a quo warranto in respect of an election which had taken place. Then comes the provision as to mandamus, and the mandamus contemplated as still existing is only "a mandamus to proceed to an election," not to allow a person to make use of the form of mandamus for the purpose of doing that which they had already provided should not be done except by election petition.

The inappropriateness of the remedy, I think, has led to this somewhat protracted litigation. But to my mind the question which your Lordships have to decide may be determined by a simple consideration of the effect of the 2nd section of the Ballot Act as applied to a municipal election. I do not think it can be denied that the functions of a returning officer have undergone some modification from time to time, and I do not think it will be found that the decisions are absolutely uniform as to what his functions consisted of. But his functions have now been regulated by statute; and, confining myself for the moment to the

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particular returning officer with whom we are dealing, the machinery of the municipal election is defined with great precision, and I think that the functions of the different persons who are to take part in the management and machinery of the election are marked out by strict boundaries. In the first place there is to be a nomination paper. That nomination paper may be the subject of attack, as it was in this case. The mayor is the person who is to determine whether the nomination paper is good or not. When the mayor has determined that the nomination paper is good, his functions are at an end. In the case of a borough divided into wards the mayor is not himself the returning officer, but the person who is elected for the period for the purpose of being the returning officer is an alderman assigned for that purpose by the council. It is he who is to exercise the functions of returning officer.

Now what functions are those which he is to exercise? As we have seen, the determination upon the nomination paper is the function of the mayor; the mayor is to decide whether or not the nomination paper is good. It is almost inconceivable that the returning officer, unless very express words in the statute should convey such a function, is to have the same or an overruling power over the nomination paper. And if the nomination paper is so far good, when the mayor has decided that the person therein nominated is to be a candidate at the election, what then is the function of the returning officer? If the statute had left us without any guide I should have thought that it was tolerably apparent that the only thing then to be done is to provide for the actual voting for the person so nominated; and all questions as to the qualification or disqualification of the voters are got rid of; a voting paper is to be given to every person who is upon the burgess roll, and the returning officer is to do that which is described as the "declaration" of the person who has been elected.

Sect. 2 of the Ballot Act enacts that "after the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance,

open the ballot boxes and" do what? "ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given." I pause there, because the rest of the sentence has reference to the return to the Clerk of the Crown in Chancery, and therefore is not appropriate to a municipal election.

Therefore it appears to me that the function of the returning officer therein spoken of as applicable to a municipal election is to do and only to do that which the statute prescribes. The question of the nomination has been disposed of, the question of the validity of the votes has been disposed of, subject of course to any question of scrutiny hereafter by petition; but both of those things have been disposed of in a manner which does not come within the jurisdiction of the returning officer at all. He is to do therefore the thing which the statute expressly says he shall do, namely, to count the votes, that is to say the written papers so put into the ballot boxes, and according to their number to declare which candidate is elected.

One function is no doubt given to the returning officer, and that is a judicial function, with regard to the question of the validity of the voting papers as papers, to see whether they comply with the statute or whether there is any objection to them. That is the only judicial function which he possesses. Now it is not suggested in the present case that any difficulty arises either as to the validity of the voting papers as voting papers, or as to ascertaining the number of those voting papers which are alleged to be valid; but it is suggested that we are entitled, and that by mandamus the appellant is entitled, to enter into the question whether or not the candidate himself was qualified or disqualified at the time when those voting papers were given. With that point I have already dealt, and it appears to me to be conclusively settled by the 87th section of the Act.

But then it is said that the appellant was really the person who was declared to be elected; and upon that subject we have had a very interesting and learned argument. But the declaration here is not like the return of a returning officer to Parliament, where the only question is who has been returned, and the writ is

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indorsed with the name of the person returned and it goes into the office of the Clerk of the Crown bearing the name of the person who has been returned. The machinery is different, and the machinery here affects the whole function which the returning officer has to perform. What he is to do is not to make a return upon the writ, but he is to count the votes, "and forthwith to declare to be elected the candidates or candidate to whom the majority of votes have been given." Now in strictness I do not think that the returning officer here complied with that requirement. I very much doubt whether he had any authority to adjourn for any such purpose as it is suggested he adjourned for. For the reasons which I have already given it appears to me that if he entered into an inquiry as to the qualification or disqualification of the candidate he was departing entirely from the jurisdiction with which the legislature had invested him; and I think that a question might arise whether or not any declaration in pursuance of that part of the section has ever been made in this case at all. It is not necessary to decide that point, because if no declaration has ever been made it is equally fatal to the demand for this mandamus.

But the written paper which is relied upon as a declaration is a written paper which states that Meshach Roberts had a majority of votes, and *that*, if it be a declaration, is the only declaration which has been made at all. Upon that written paper the returning officer has taken upon himself to add that for the reasons which he has given the candidate who had the majority of votes has not been elected and the candidate who had the minority of votes has. He has done that which he had no function or authority to do. The only declaration which is apparently contemplated by the 2nd section is a verbal declaration by the returning officer at the time that such and such is the result of the poll. In this case he has by a written paper stated who had the majority of votes.

Therefore if your Lordships should be of opinion that the only function of the returning officer was to count the votes and to declare the result of that counting of the votes, and if in this case he did in fact declare what was the number of votes given, it is unnecessary to decide anything further. He has in effect

made a declaration that Meshach Roberts was the elected candidate, and all beyond that is outside his functions and ultra vires. He has done that which enables your Lordships to say that Meshach Roberts was the person by law elected, and therefore the whole foundation for the argument which your Lordships have heard fails, because Meshach Roberts has upon that hypothesis been declared to be the elected candidate, and the appellant can have no ground for proceeding against him.

I have expressly confined myself to dealing with the form of election and the mode in which this declaration has been made; because I quite recognise the fact that there are serious and important questions behind, which it appears to me it would be inappropriate to deal with.

For these reasons I move your Lordships that this appeal be dismissed and that the order of the Court below be affirmed with costs.

LORD WATSON:—

My Lords, the discussion upon this case has taken a very wide range, but neither the argument which was addressed to us some time ago nor the able addition which has now been made to it by Mr. Douglas has convinced me that cause has been shewn for disturbing the judgment of the Court of Appeal. There are a great many questions of interest and importance which have been raised upon these proceedings; but I do not think it necessary to express either concurrence in or dissent from the opinions given by the learned Judges of the Court of Appeal upon any of these questions save one, upon which point their opinion has my entire concurrence. It appears to me, that the appellant has failed to shew that he was either formally elected or declared to be elected as a councillor of the municipality of Bangor in November 1886.

It has been argued that we ought to have regard, in this case, to the provisions of the repealed Act of 1835 with respect to the powers and duties of the returning officer at a municipal election, and to the decisions relating to these provisions, which are said to have been re-enacted in the Municipal Corporations Act of 1882, except in so far as they are qualified by the new provisions

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of the later Act, and those clauses of the Ballot Act which are incorporated with it. It appears to me that the whole question in this case turns upon the terms of the two later Acts and that the Act of 1835 throws very little light indeed upon the question with which we are now dealing. In the case of a borough divided into wards the duty of conducting the election is divided between the mayor of the borough and the alderman of the ward. The function assigned to the mayor of the borough is to receive nominations and to determine which of these nominations shall be treated, for the purposes of municipal action, as "valid nominations," that is the statutory expression. I do not think that the legislature has empowered him to deal or intended that he should deal with every kind of objection which might be raised to a nomination paper. I do not think that jurisdiction is given him to dispose of such an objection as is alleged in the present case. The 3rd schedule to the Act of 1882, which contains the rules, rather points to his disposing of formal objections arising upon the face of the nomination paper, and making inquiry as to whether the nominators have their names on the burgess roll and whether the paper is in statutory shape. If no objection is made, or if objections are stated and repelled by the mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election and that the nominee in that paper should be treated as a person for whom votes could be given before the returning officer.

Where there are more valid nominations than vacancies in the ward the papers are sent to the returning officer, the alderman, and his duty is very clearly defined by the 2nd section of the Ballot Act. There seems to be no à priori probability that the legislature, who have committed to the mayor the duty of examining and passing these nomination papers, should have intended that an officer whose simple duty is to take the poll and report its results, should have the power committed to him either to exercise a jurisdiction with regard to these nomination papers,

which is not given to the mayor, or to revise the judgment of the mayor. It would require very express words or very plain implication in the provisions of the statute to raise any such power in a mere polling officer. But the 2nd section of the Act of 1872 does not contain the slightest indication that such a power was intended to be given. Certain judicial duties are committed to the returning officer. He is to decide upon the validity of ballot papers, and his decision remains final if not challenged and reversed in an election Court. But so far as regards the taking of their votes from the electors, and the reporting of the result of these, it humbly appears to me that his duties are purely ministerial. He is to count the votes, and when he has done so and has ascertained the number given for each of the candidates he is to make a declaration of the number of the votes and of the persons who have received the greater number. Having done that he is functus officio.

In the present case the poll proceeded upon that footing. At the end of it there was no declaration made forthwith; the declaration followed the result of the counting somewhat tardily. I do not mean to express any opinion as to whether, if objection were taken to a declaration made at the end of twenty-four hours, a declaration delayed for the purpose of performing some function or other which the returning officer was desirous of usurping, that would be a good statutory declaration. It is immaterial in this case whether it was or was not. If there was no declaration, then there was no completed election of either of these two candidates. If again the declaration is to be held sufficient, it contains a statement of the actual results of the poll in terms of the statute, and to that extent being within the powers of the returning officer it must, I conceive, receive effect. But so far as it goes further and professes to deal judicially with the merits of a question which at that time the returning officer had no jurisdiction to entertain, and I would add no proper information to enable him to dispose of, so far as it does that it is entirely ultra vires, and can only be looked upon as a gratuitous expression of the private legal opinion of that gentleman.

On these grounds I concur in the judgment which has been moved by my noble and learned friend the Lord Chancellor.

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LORD FITZGERALD :—

My Lords, I also concur in the judgment which has been delivered by the Lord Chancellor and generally in the conclusions at which he has arrived, and also with my noble and learned friend opposite (Lord Watson) in the very guarded language in which he has expressed his opinion upon the course of this election and its legal results.

In order to maintain his position in reference to the remedy which he has sought to put in force Mr. Pritchard, the appellant, was bound to make out certain propositions : first the ineligibility of his opponent, Mr. Roberts. That point was properly raised by Mr. Pritchard by the objection which he made to the nomination of Mr. Roberts. That was a proper mode of raising the objection. But the statute gave to the mayor the authority of determining in the first instance upon objections made to nominations. The mayor disallowed the objection, and accordingly Mr. Roberts was presented to the electors as a person eligible for election to the office which he sought. The appellant was bound to make out further, in order to bring himself into a majority, that the voters were not only aware of the fact on which the alleged ineligibility of Roberts arose, but also that they had notice that in consequence the votes given by them for Roberts would be absolutely lost and thrown away. This involved matter of fact which neither the mayor nor the returning officer had any authority to investigate. These two questions, the one primâ facie disposed of by the mayor and the other subsequently arising as to whether the votes given for Roberts were lost or thrown away, were questions to be legally and properly determined in the terms of the statute. That jurisdiction is a new one expressly intended to achieve promptness of decision at a small expense. The process prescribed is a very simple one. The statute declares that these questions shall be determined on petition.

The remaining proposition which the appellant is bound to make out, and without which he could not have the remedy by peremptory mandamus, even supposing that the two other questions were determined in his favour, is that he was full of the office, that is, that he had been legally returned as the person legally entitled to that office, and that he had done all that was

necessary by law to put him in full possession, but was kept out of it by the action of the corporation or of some intruder. It is upon that ground, and upon that ground alone, that under the circumstances he could have maintained a right to a mandamus. A peremptory mandamus may be given where the office is legally full, and the person lawfully entitled is kept out of it by some action of the corporate body or of some intruder.

I quite concur in the observations made by my noble and learned friend opposite (Lord Watson), and I would now conclude if it were not that I wish (I am speaking now for myself only as an individual member of the House) to guard myself against any supposition that I concur in the strictures which have been pronounced in the Court of Appeal upon *Reg.* v. *Coaks* (1). That case represents a decision in my judgment of very high authority, and it appears to have governed the practice for a great number of years. I regard it still in that light; and if we had now to determine the question whether Roberts was disqualified or not, whether he was eligible or ineligible (whichever way you choose to put it), I should regard *Reg.* v. *Coaks* (1) as a direct authority upon the question, if there has not been any such alteration in the law made by the Act of 1882 as renders it inapplicable to the present case, a question upon which I am not at all satisfied, and desire to express no opinion. I by no means agree in some of the criticisms upon that case which were pronounced in the Court of Appeal. The Master of the Rolls says: "It seems to me that the judges decided that case upon a view that by the special verdict, with regard to this proposition, the case was practically stated out of Court." Another of the Lords Justices makes this observation: "I am of opinion that that question" (that is, the question of disqualification) "was never considered by the Court at all." I cannot adopt this view.

Reg. v. *Coaks* (1) was sought to be passed by in the Court of Appeal upon another ground, which I must not be taken as adopting, namely, that by operation of law the acceptance of an inconsistent office, i.e., the office of councillor, vacated the office of alderman. Upon that I express no opinion.

Upon the whole, I concur in the judgment which has been moved by the Lord Chancellor.

(1) 3 E. & B. 249; 23 L. J. (Q. B.) 133.

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LORD HERSCHELL :—

My Lords, I have not been convinced by the able argument of Mr. Douglas, who I think has urged all that could be said in favour of the appellant's view, that the judgment of the Court below ought to be reversed. I think that his entire argument depends upon his establishing that at the date of the election for the borough of Bangor, on the 1st of November 1886, the appellant, Mr. Pritchard, was elected or declared elected councillor for that borough. If he was not so elected or declared elected I do not think that he is in a position to apply for a mandamus to compel the reception of his vote. If Mr. Roberts, the other candidate, was elected and declared elected, then it is perfectly clear that his election cannot be questioned by means of a proceeding of this kind.

The question whether or not Mr. Prichard was elected and declared elected depends upon the powers possessed by the presiding alderman as returning officer, and the exercise by him of those powers on the occasion in question. As regards his powers, the chief reliance of the appellant has been placed upon the decisions which were pronounced under the statute of 1835, the earlier Municipal Corporations Act; and an attempt has been made by analogy to extend those decisions and to prove them to be applicable to the legislation which governed this election. It appears to me that the legislation which was in operation at the time when this election took place differs most materially from the legislation which governed municipal elections at the time when the decisions upon which reliance has been placed were pronounced. Under the statute of 1835 the mayor and assessors presided at elections of councillors, and there was nothing in the nature of a nomination or preliminary proceeding prior to the day of election, but on the day of election every voter was entitled to vote for such person as he in effect at that time himself nominated, by means of delivering in a voting paper containing the name of the candidate for whom his vote was tendered; and sect. 35 prescribed what was to be done by the mayor and assessors after the poll was at an end in the case of a contested election.

The provisions relating to the election of councillors now depend upon subsequent legislation, and the system seems to me

to be a very different one. Several days before the election there are to be nomination papers, signed by two burgesses and assented to by eight others, delivered in to the mayor, and the mayor is to entertain an inquiry as to the validity of those nomination papers. Upon objection in writing he may either allow or disallow it. If he disallows the objection the nomination is to be valid, and cannot be questioned, as I understand the provisions of the 3rd schedule of the Act, in any subsequent proceeding. If he allows the objection his determination is subject to review upon an election petition. Now those provisions appear to me to indicate that it could not have been intended that the mayor should entertain such a question as the qualification of a candidate; because it is impossible to suppose that the legislature provided that a question of that sort should on, it may be, very imperfect information and without legal assistance, be finally and conclusively determined by the mayor. I think that the objections to the nomination papers referred to in the Act do not include any such question as the qualification of a candidate.

But when the mayor has once investigated the objections arising to any nomination paper and upheld its validity, then the candidate is validly nominated, and those valid nominations are to be published in the manner prescribed by one of the rules contained in the 3rd schedule to the Act.

Turning, then, to sect. 56: "If the number of valid nominations" (which obviously refers to the nominations held valid by the mayor) "exceeds that of the vacancies, the councillors shall be elected from among the persons nominated. If the number of valid nominations is the same as that of the vacancies the persons nominated shall be deemed to be elected." As I apprehend, therefore, if a person who was disqualified were nominated before the mayor, and his nomination paper were perfectly regular and fulfilled all the conditions required by the Act and were accepted by the mayor, then he would be deemed to be elected notwithstanding that he was disqualified. But, of course, his election would in such a case be open to question by means of an election petition. If the number of valid nominations exceeds that of the vacancies there must be an election, and the conduct of that election is committed to the alderman selected for the

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purpose. But until the day of the election, as I understand it, the alderman who is made the returning officer possesses no functions whatsoever in relation to the election. All that he is to deal with is the conduct of the election amongst the persons who are nominated in the manner that I have described.

Then the Ballot Act, which was not in operation under the Act of 1835, prescribes the duties of the returning officer, and, as it seems to me, prescribes them with great exactness. I quite agree that if it had been the settled and well-established practice prior to the passing of the Ballot Act that the returning officer was the proper functionary to determine such questions as those which we are now considering, it might have been possible to read the Ballot Act as prescribing certain of his functions, and yet leaving him possessed of those which at common law had been held to be inherent in the office of a returning officer. But certainly no precedents have been cited to shew that there was any well-established practice which it is possible to read into the Ballot Act with its minute prescription of duties.

Section 2 of the Ballot Act prescribes that the returning officer "shall in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot-boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given." I think that the fact that he is "forthwith" to make the declaration points strongly to his having no judicial duties, such as it has been suggested he possesses, which he must exercise before he is in a position to declare it. But beyond that, the section provides that "the decision of the returning officer, as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return." Now it seems to me that the expression of that particular judicial function, and the provision that it shall be final subject to reversal on a petition, indicates that it is the only judicial function which the returning officer is intended to exercise. According to the argument for the appellant his decision as to the qualification of a candidate is equally final, and is only subject to reversal on a petition questioning the validity of the return. It seems to me

to be impossible to give any reason for inserting that particular provision, which would not equally apply to the insertion of a similar provision in relation to all other matters standing in the same position as the decision with regard to ballot papers.

Therefore I come, without doubt, to the conclusion that the returning officer has no functions beyond those which are defined by the Ballot Act.

Mr. Douglas has argued that such a conclusion will lead to great inconvenience, and that there are distinct advantages in the returning officer having the power to pronounce and give effect to his opinion upon the qualification of a candidate. I can quite conceive that there may be cases in which it would be advantageous that the returning officer should have such a power where the disqualification is a matter absolutely clear and beyond question; but, if I look at the balance of convenience, it seems to me to be enormously the other way. The question of qualification or disqualification must frequently depend upon nice points of law, and often upon difficult and disputed questions of fact. If the returning officer has the power in one case he has it in every case. It seems to me, that so far from its being expedient to hold that he has this power in every case, if it were a matter of doubt one's inclination would be entirely the other way. I can conceive nothing more disadvantageous than the conclusion, unless one were forced to it, that these questions are in every case committed to the determination of the returning officer, and that he can declare elected a person who has not received the majority of votes because he has come to the conclusion that for some reason or other one of the candidates is disqualified.

Having arrived at the conclusion that the returning officer has no power beyond that to which I have referred, what remains? In the present case he did not "forthwith declare," but he did shortly after the election make public and record the fact that he had found the majority of votes to be given not to the appellant but to Mr. Roberts. It seems to me that in so doing he declared Mr. Roberts elected, and that the addition of an expression of his opinion as to the law, which he had no legal power to express, did not affect what he had done in declaring that

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Mr. Roberts had obtained the greater number of votes, from which it followed, as it seems to me, that in point of law he was the candidate elected. But, as I have said, even if this is to be regarded as a nullity and no declaration at all, then Mr. Pritchard has not been elected, and not having been declared elected it is certainly not competent for him to institute such a proceeding as this.

If Mr. Roberts was elected, then by virtue of the provisions to which my noble and learned friend on the woolsack has already called attention, and which I need not repeat, the question which is sought to be raised in these proceedings could only be determined by means of an election petition. I think that it was intended to put an end to the difficulties which had often arisen as to the proper mode of procedure, whether in a particular case it was to be by mandamus or by quo warranto, and to create a simple mode of procedure which would, shortly after the election, settle the questions in dispute.

Upon these grounds it seems to me that the appeal must fail.

Upon what may in some sense be called the main question, that as to the eligibility of Mr. Roberts as a candidate, I do not intend to express any opinion. I certainly must not be understood as indicating any dissent from the view which has been expressed by the Court of Appeal.

I should like to say one word with regard to the case of *Reg.* v. *Coaks* (1), to which my noble and learned friend opposite (Lord FitzGerald) has referred. I quite agree with him that it is not necessary on the present occasion to come to any conclusion as to whether that case was rightly decided, or whether if rightly decided it is applicable, having regard to the altered legislation with which we have to deal. But it seems to me, that as far as regards the question whether an alderman is capable of standing as a candidate for the office of councillor, the case of *Reg.* v. *Coaks* (1) was not a considered decision of the Court of Queen's Bench. According to the report of the case to which our attention has been called, it was assumed, and was necessarily assumed, that the candidate was ineligible because it had been so determined in another proceeding, as I understand, with reference to the particular case and the particular individual. The decision therefore,

(1) 3 E. & B. 249; 23 L. J. (Q.B.) 133.

if it be a decision, of the Court of Queen's Bench with regard to the eligibility or the non-eligibility of an alderman, was pronounced in an earlier case of which no report appears to be forthcoming except one contained in the local papers of the period; and, so far as we have learnt from the information which has been afforded to us, the point was really not argued there, because the learned counsel who appeared to contend in favour of the eligibility of the alderman intimated that they should have great difficulty in doing so, and practically abandoned the case, upon which of course the decision against them followed. We are ignorant of the circumstances under which that took place. No doubt they were counsel of very great eminence, but that appears to have been the mode in which the decision in *Reg.* v. *Coaks* (1) was arrived at. I have thought it desirable to state what my view is of the position of the case of *Reg* v. *Coaks* (1), but it is not necessary, and I do not desire, to express any opinion as to whether it was well decided or whether it is applicable to the present case.

LORD MACNAGHTEN :—

My Lords, the case has been very ably argued by Mr. Douglas. But notwithstanding his argument I do not think it is necessary or expedient to go back further than the Act of 1882.

The cases before that Act either illustrate principles which, nowadays at any rate, require no illustration, or, being decided on a different statute differently worded, are, perhaps, as likely to mislead as to afford any light or guidance.

The Act of 1882 with so much of the Ballot Act as is made applicable, forms a complete code, and prescribes in language not, I think, susceptible of doubt, what the duties of the returning officer are. In municipal elections the returning officer, when not the mayor, has nothing to do with the nomination or the preparations for the election. He has to decide any question arising in respect of any ballot paper, and so far his decision is made final, but subject to reversal on an election petition. He has to ascertain the result of the poll by counting the votes, and he is forthwith to declare elected the candidate to whom the majority of votes have been given.

(1) 3 E. & B. 249; 23 L. J. (Q.B.) 133.

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Now, in this case the returning officer added up the votes and brought out the figures correctly. He had no doubt of the arithmetical result. He did not think it necessary to go through the process again. It then became his duty to declare the candidate with the highest number of votes elected. He had no power to do anything else. Instead of that he goes home without making any declaration. Then, apparently on the strength of a somewhat singular opinion, which was taken before the nomination, and was to the effect that the nomination of Mr. Roberts would be void and one which it would be the duty of the returning officer to reject, he makes a return so contradictory that both parties claim the verdict. He states the number of votes given for each candidate. That statement in connection with the terms of the Act, makes it plain, that is, "declares" which of the two was elected. The rest of the placard issued by the direction of the returning officer purports to declare some one else elected. But that conclusion is in my opinion unwarranted by the Act, idle, and inefficacious. I think that the final declaration of the numbers by the proper officer is in itself a declaration of the election of the person who has the highest number, and that it is not rendered nugatory because the returning officer chooses to tack on to it a private opinion of his own which is in the teeth of the Act, and announces a result which does not and cannot follow from the only facts which it was his duty to ascertain.

For these reasons, without expressing any opinion on the other points which have been argued, and which if raised ought to be raised and determined on an election petition, and certainly without expressing approval of the case to which my noble and learned friend on my left (Lord FitzGerald) has referred, I concur in the motion which has been proposed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 6th March 1888.

Solicitors for appellant: *Belfrage & Co., for R. S. Chamberlain, Llandudno.*

Solicitors for respondents: *Bloxam & Ellison, for J. B. Roberts & Roberts, Bangor.*

[HOUSE OF LORDS.]

WILLIAM WHITE AND ANOTHER . . . . APPELLANTS; AND TYNDALL AND OTHERS . . . . . RESPONDENTS.

H. L. (I.) 1888 March 19.

Landlord and Tenant—Lease—Demise to two as Tenants in Common—Covenant, whether joint or several.

Premises were demised to G. and A. "their executors, administrators and and assigns," habendum to "the said G. and A. their executors, administrators and assigns as tenants in common and not as joint tenants" at a single yearly rent; and G. and A. covenanted "for themselves, their executors, administrators and assigns that they the said G. and A. or some or one of them, their executors, administrators or assigns" would pay the said yearly rent and keep the premises in repair. G. having died during the term, the lessor sued A. and the executors of G. for breaches of covenant occurring after G.'s death:—

Held, that the covenants were in form joint and not several and that G.'s executors were not liable.

The decision of the Court of Appeal in Ireland (20 Law Rep. Ir. 517) reversed, and the decision of the Irish Common Pleas Division (18 Law Rep. Ir. 263) restored.

APPEAL from a decision of the Court of Appeal in Ireland, upon a demurrer (1).

The statement of claim contained the following allegations:—

By an indenture of lease made in January 1842 Pope demised to George White and Albert White "their executors, administrators and assigns" a piece of ground in Waterford on which was "erected a large corn store" and some houses, with liberty for George White and Albert White "their executors, administrators and assigns, their servants and workmen, their horses cars carts and other conveyances to use and enjoy" a certain road; reserving to the lessor liberty to pass and repass through the demised premises, the lessor doing no wilful damage to the demised premises or to the property or effects "of the said George White and Albert White their executors, administrators or assigns:"

To have and to hold the premises "unto the said George

(1) 20 Law Rep. Ir. 517.

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White and Albert White their executors, administrators and assigns as tenants in common and not as joint tenants" from the 25th of March next for the term of 68 years, "they the said George White and Albert White their executors, administrators and assigns" yielding and paying the yearly rent of £150 by equal half-yearly payments.

The covenants to pay rent and repair were as follows:—

"The said George White and Albert White do hereby for themselves, their executors, administrators, and assigns covenant, promise and agree to and with the said Richard Pope, his executors, administrators and assigns in manner and form following; that is to say that they the said George White and Albert White or some or one of them, their executors, administrators or assigns shall and will from time to time and at all times during the term hereby demised well and sufficiently satisfy, content and pay unto the said Richard Pope his executors, administrators or assigns the said hereinbefore reserved yearly rent, upon the days and times herein reserved for the payment thereof, clear above all taxes as aforesaid (quit rent and crown rent only excepted) according to the true intent and meaning of these presents:

"And shall and will during the continuance of the term hereby demised well and sufficiently support, maintain and keep the said premises hereby demised and all improvements made and to be made thereon in good and sufficient tenantable order, repair and condition, and at the end, expiration or other sooner determination of this demise shall and will so leave and yield up the same in the like good sufficient tenantable order, repair and condition."

George White died in January 1883, and the defendants in this action were Albert White and the executors of George White.

The lessor's estate having become vested in the plaintiffs (the respondents in the present appeal), they claimed one year's rent due on the 29th of September 1885, and damages for breach of the covenant to repair.

Albert White (the surviving lessee) suffered judgment by default.

The executors of George White by the 2nd paragraph of their

statement of defence alleged as to the claim for rent that before the rent of the half-year ending 29th of September 1884 became due they by deed in March 1884 assigned to one Anthony the undivided moiety and all other their estate and interest in the premises for the unexpired residue of the term, and gave the plaintiffs notice thereof, and afterwards paid the half-year's rent due on the 29th of September 1884, being the gale day next following the serving of the notice.

By the 4th paragraph they alleged that from the time when they became possessed of the premises up to the gale day next after giving the above-mentioned notice they performed the covenant to keep in repair.

The plaintiff having demurred to the 2nd and 4th paragraphs, the Common Pleas Division (Morris C.J. and Harrison J.), being of opinion that the covenants were joint and not several, overruled the demurrer (1).

The Court of Appeal in Ireland (Lord Ashbourne L.C. and FitzGibbon and Barry L.JJ.) reversed that decision and allowed the demurrer (2).

Against this decision the defendants appealed.

Feb. 16, 17. Sir *Horace Davey* Q.C. and *Finlay* Q.C. (*M. J. Druitt* with them) for the appellants:—

The appellants are only liable (if at all) upon the express covenants. A lessee has both a privity of contract and a privity of estate. If he assigns he remains liable upon the contract but not upon the privity of estate: Woodfall's Landlord and Tenant, p. 161 (13th ed.). The question therefore here is only whether the covenants are joint or several.

The rule for determining whether a covenant is joint or several was misunderstood and misapplied by the Irish Court of Appeal. The rule (so far as concerns the present point) is that where the words are expressly joint the covenant is joint, but where they are ambiguous the interest of the parties may be looked at. That rule, moreover, is applicable only to covenantees, not to covenantors. Where the right of action in covenantees is considered their interest may be regarded: where the liability of covenantors is

(1) 18 Law Rep Ir. 263. (2) 20 Law Rep. Ir. 517.

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considered the words and the form of the covenant must be regarded. Here the covenant is in terms joint: the words are apt and usual to express a joint covenant, and there is no ambiguity, the provision that the lessees are to be tenants in common and not joint tenants being inserted for the convenience of the lessees merely. But even if the rule is applicable to covenantors it does not help the respondents, for the rent being single the lessees' interest was joint, not several.

The rule is stated in 1 Sheppard's Touchstone, 166, and discussed by Preston in his edition of 1820: see also Platt on Covenants, 117, 123. Platt says (p. 117): "If two covenant generally *for themselves*, without any words of severance, or that they *or* one of them shall do such a thing, a joint charge is created, which shews the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts," citing *Robinson* v. *Walker* (1), per Holt C.J.

Wilmer v. *Currey* (2) is a very strong authority for the appellants. There two covenanted for themselves their heirs, executors, administrators and assigns that they or one of them would pay a sum of money: Knight Bruce V.C. held that this was at law a joint covenant only and could not be otherwise construed in equity, and that the executrix of one of the covenantors was not liable. This authority is not impaired by *Beresford* v. *Browning* (3), which was a decision on the liability of mercantile partnerships, and where the authorities on that subject are collected. See also per Lord Cairns as to joint and several liability at law and in equity upon partnership debts: *Kendall* v. *Hamilton* (4). The decisions on partnership debts do not affect the present question. The present covenant resembles that in *Levy* v. *Sale* (5) where it was held to be joint. *Clarke* v. *Bickers* (6) is another strong authority for the appellants. There premises were demised to A. and B. (co-partners) upon which they carried on their partnership business. A. died during the lease and after his death his executors carried on the business in co-partnership with B. on the premises. Held nevertheless that the covenants

(1) 7 Mod. 154; 1 Salk. 393.
(2) 2 Dr. & Sm. 347.
(3) Law Rep. 20 Eq. 564; 1 Ch. D. 30.
(4) 4 App. Cas. 504, 516, 517.
(5) 37 L. T. (N.S.) 709.
(6) 14 Sim. 639.

in the lease which were joint only were not to be considered as several as well as joint, so as to make A.'s estate liable for breaches of the covenants which occurred after his death. Shadwell V.C. said "that no equity arose to the lessor from the circumstance that the lessees were co-partners; that lessors were *domini factorum* and determined for themselves how their leases should be granted."

The following are authorities upon the question whether covenantees can sue severally: *Slingsby's Case* (1); Co. Litt. 196 b–198 b, sects. 314, 315, 316; Comyns' Digest, "Abatement," E. 10; *Wallace* v. *M'Laren* (2); *Foley* v. *Addenbrooke* (3); *Sorsbie* v. *Park* (4); *Bradburne* v. *Botfield* (5); *Keightley* v. *Watson* (6); *Thompson* v. *Hakewill* (7); and the notes to *Eccleston* v. *Clipsham* (8). *Palmer* v. *Mallet* (9) is the last of a long series of authorities in equity upon that subject. The result of the authorities as to covenantees is that if they are applicable to cases of covenantors they are in favour of the appellants: for the principle is that where the words of a covenant are joint it will be so construed though the interest be several, but where the words are ambiguous they may be construed to be joint or several according to the interest. *Tippins* v. *Coates* (10) is an illustration of the sort of ambiguity that is meant. There is no authority for the contention that on a demise to two as tenants in common and not as joint tenants joint covenants are to be construed as several.

The landlord is not without his remedy and the hardship anticipated by FitzGibbon L.J. does not exist, for the assignee to whom the appellants assigned their undivided moiety is liable upon the covenants.

F. Meadows White Q.C. and *G. R. Price* (of the Irish Bar) for the respondents:—

In construing covenants to determine whether they are joint or several the Court will look at the whole deed. There are indications in this lease of the intention that the covenants should

(1) 5 Rep. 18a.
(2) 1 Man. & R. 516.
(3) 4 Q. B. 197, 203.
(4) 12 M. & W. 146.
(5) 14 M. & W. 559.
(6) 3 Ex. 716.
(7) 19 C. B. (N.S.) 713, 719.
(8) 1 Wms. Saund. 162 (Ed. 1871).
(9) 36 Ch. D. 411.
(10) 18 Beav. 401.

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be several:—The demise is to George White and Albert White "their executors, administrators and assigns." In that sentence and elsewhere throughout the deed "their &c." means the executors &c. of each of them. And reading in with this the habendum clause, "to hold the premises unto G. White and A. White their executors, administrators and assigns as tenants in common and not as joint tenants," the expression "their executors &c." means "the executors of each of them as tenants in common and not as joint tenants." The introduction of the words "a large corn store" shews that the object was a trading partnership. The grant of a right of easement for the lessees their servants and horses over a passage must have been meant to be enjoyed in severalty. Then come the covenants in question, those to pay rent and repair, and reading these in connection with the other parts they should be construed as several. At all events they are not clearly joint: at the most they are neutral, and if so they will be construed as several, the interests of the lessees being that of tenants in common and not of joint tenants. The words "as tenants in common &c." were introduced in order to preserve the liability in the case which has happened—the death of the solvent lessee, and the bankruptcy of the survivor.

The rule of construction according to interest applies to covenantors as well as covenantees. Preston in his comment on Sheppard's Touchstone, p. 166, speaking of covenants *to or with* the covenantors or covenantees, says: "The implication or construction of law, when the words are ambiguous or are left to the interpretation of law, will be that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect." Moreover a joint promise is evidence to support a several liability. Even upon a joint bond in which the remedy at law was gone equity relieved where the nature of the transaction implied the obligee's right to demand the consideration from the parties severally. "All contracts with partners are joint and several; every partner is liable to pay the whole," per Lord Mansfield in *Rice* v. *Shute* (1). In that case, of two

(1) 5 Burr. 2611, 2613.

obligors the solvent one was dead and the Court enforced payment against his representatives. *Levy* v. *Sale* (1) and *Clarke* v. *Bickers* (2) are not in point, the demise in each of those cases being in terms joint, and nothing to shew an intention that they should be construed severally. In *Robinson* v. *Walker* (3) Holt C.J. was overruled by the rest of the Court. No precedent has been found of a lease to two as tenants in common and not as joint tenants. The authorities cited contra as to covenantees are not relevant to the present question.

The House took time for consideration without hearing the appellants' counsel in reply.

March 19. LORD HALSBURY L.C.:—

My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend on my right (Lord FitzGerald). I entirely concur in it and have but a very few words of my own to add.

In this case the whole question turns upon whether the language of the covenant on the part of the lessees of a holding to pay rent and keep in repair is joint or several, and no question has been raised, or indeed can be, that following one unbroken series of authorities the language used would make a joint covenant.

The late Mr. Platt on page 117 of his work on Covenants, published more than half a century ago, puts the proposition in words that have never been questioned, as far as I am aware, since his time. With respect to the form he says: "No particular words are necessary to constitute a covenant of either kind" (that is to say either joint or several). "If two covenant generally *for themselves*, without any words of severance, or that they *or* one of them shall do such a thing, a joint charge is created; which shews the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts." See *May* v. *Woodward* (4); *Robinson* v. *Walker* (5).

FitzGibbon L.J. does not, as I understand, doubt that the

(1) 37 L. T. (N.S.) 709.
(2) 14 Sim. 639.
(3) 7 Mod. 154; 1 Salk. 393.
(4) Freem. 248.
(5) 1 Salk. 393.

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language of the covenant would shew a joint covenant but for the fact that the demise was to the two lessees as tenants in common. But I confess that I am unable to follow the distinction which the learned judge draws to the conclusion at which he arrives. It is true that the parties to whom the demise is made are to hold it as tenants in common, but what they covenant to do is to pay one rent, not two rents, and not each to pay half a rent, but one rent.

The same answer may, I think, be given to Barry L.J.'s somewhat quaint illustration. To the argument implied in his illustration the answer is obvious; the wigs are many—but here the rent is one. I think it is hardly accurate to say that the word "their" is an ambiguous word. Its grammatical force is of course like that of other pronouns and its application must be ascertained from the context.

I am therefore of opinion that the judgment of the Common Pleas Division should be restored and the judgment of the Court of Appeal reversed, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, I also am of opinion that the order appealed from must be reversed.

I think it is a mistake to say that the language of these covenants is ambiguous. Taken by themselves, they plainly import joint and not several liability. No doubt the context might be such as to impose upon them a meaning which they do not *primâ facie* bear; but there is nothing to suggest the several liability of the lessees except the fact that in order to prevent either of them taking the whole by survivorship, it is declared in the habendum that they are to hold as tenants in common. That is an interest which is just as consistent with a joint as with a several liability to pay one undivided rent, and to execute all necessary repairs. In these circumstances the authorities relied on by the Court of Appeal appear to me to have no application.

I have had the advantage of considering in print the judgment about to be delivered by my noble and learned friend opposite, in which I entirely concur, and I do not consider it necessary to say more.

LORD FITZGERALD :—

My Lords, this appeal is from an order of the Court of Appeal in Ireland of the 21st of February 1887, reversing a decision of the Common Pleas Division.

The action was on covenants contained in a lease dated the 21st January 1842, made by Richard Pope to George White and Albert White, of a corn store and premises in the liberties of the city of Waterford, for a term of sixty-eight years, at a rent of £150.

The plaintiffs in the action were Tyndall and several others, to whom the estate and reversion of Pope had come, and the defendants were Albert White, the surviving lessee, and the executors of George, his co-lessee, who had died in January 1883. The writ of summons was issued on the 18th December 1885. The rent claimed by the plaintiffs was for the year ending the 29th of September 1885. The plaintiffs also claimed a considerable sum on the covenant for keeping in repair. The defendant Albert White did not defend the action. The other defendants (executors of George, the deceased lessee) put in several defences to each portion of the demand of the plaintiffs, to which there was a reply and a demurrer.

It is not necessary to refer further to the pleadings, as eventually the question which arose was whether the statement of claim disclosed a cause of action against the defendants (executors of George) for breaches of covenant occurring after his death.

The question is whether the covenants of the lessees were joint covenants only, or were the several covenants of each of the lessees with the lessor. The plaintiffs alleged that the covenants were to be interpreted as several. The executors maintained the contrary.

The question thus raised is one of construction of the covenants; but in considering that question we have to look at and consider the whole instrument. The judgment of the Common Pleas Division, as delivered by Morris L.C.J., is very short and goes directly to the real point. The Lord Chief Justice states his view that the words of the covenant in clear and

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unambiguous language express a joint covenant, and he adds: "In *Levy* v. *Sale* (1), where it was argued that a similar covenant, though in form joint only, should be construed, according to the rules of equity, as joint and several, Lush J. says: 'The authorities I find are uniform in holding that where there was no antecedent separate liability, but the obligation exists only by virtue of a joint covenant, the extent of its operation is measured by the words used, and the construction was the same in equity as at law.' That case would be identical with the present, except that here the demise is to the two lessees as tenants in common. But the covenant to pay rent, if plainly a joint covenant only, cannot be treated as several by reason of the interest taken by the lessees. The covenant is, in my opinion, a joint covenant. The demurrer must therefore be overruled."

That judgment came before the Court of Appeal and was reversed, the Lord Chancellor of Ireland, who presided, observing that "in the case of *Sorsbie* v. *Park* (2) Parke B. thus stated the rule: 'A covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed if the words are capable of that construction; not that it will be construed to be several by reason of several interests if it be expressly joint.' I do not think that the words of the covenant here are so clear and unambiguous as to exclude regard being had to the interest of the covenantors in the property. If, in the words of Parke B., the covenant was "expressly joint" it should be so construed, but I do not hold the words of the covenant to be clear in the present case. Therefore, recognising the rule to the fullest extent, I apply it differently from the method adopted in the Common Pleas Division. *I accordingly, although not without doubt, construe the covenant as a several as well as a joint covenant, and the executors of the deceased covenantor remain liable to pay the rent, and to repair.*" We should find much difficulty in concurring in that judgment.

The case and the numerous authorities cited were discussed by FitzGibbon L.J. very learnedly, but we do not think it necessary to follow the criticisms of the learned judge. He

(1) 37 L. T. (N.S.) 709. (2) 12 M. & W. 158.

concludes thus, after reading the language of Lush J. in *Levy* v. *Sale* (1): "A proposition which we do not question; but the observation of the Lord Chief Justice upon that case in the judgment appealed from shews exactly the error of the decision, for he says, 'That case would be identical with the present *except that here the demise is to the two lessees as tenants in common.*' That is the very distinction which makes all the difference and requires us to hold that, the covenant following the interests of the parties, the demurrer must be allowed."

The reasons for the decision of the Court of Appeal were, therefore, as it appears, 1st, that the language of the covenant was ambiguous; and 2nd, that in such case the demise to the lessees "as tenants in common" made all the difference, and established error in the judgment of the Court of Common Pleas.

I now proceed to examine the language and provisions of the lease which we have to construe. We may dismiss at once the supposition that the lessees were co-partners in trade, and acquired the leasehold as such. It may have been so, but that it was so is mere conjecture. Nor can we give any weight to the argument drawn from the use of the word "their" in the reservation of the right of way to the lessor. The inference from the lease is that the lessor was sole owner, and entitled to a single reversion in the whole, and as it does not appear that the lessees had any previous connection with the premises, there is no ground to suppose that there was any antecedent liability.

The habendum is "to the said George White and Albert White, their executors, administrators, and assigns, as tenants in common, and not as joint tenants," and the reddendum is "yielding and paying therefor and thereout yearly and every year during the term to the lessor, his executors, administrators, or assigns, the yearly rent of £150." It may be observed that if an action had been instituted on the reddendum, it should primâ facie have been against the two jointly, or the survivor.

The rent then so reserved and payable is a single rent, payable to one individual (the lessor) in one sum by the two lessees. In case of any part of the rent being in arrear the lessor's right of distress and power to re-enter fasten on the whole premises.

(1) 37 L. T. (N.S.) 709.

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There are other provisions in the lease to which it is not necessary to refer, and which may be passed by with one observation, that they all import, or at least are consistent with, a single obligation by the lessor to both lessees, a joint obligation on the part of the lessees towards the lessor.

The covenants in question are as follows:—[His Lordship read the covenants set out above.]

The lien of these covenants, as well as the words of obligation, unquestionably import joint covenants, and it was not contended that the words "or some or one of them" could have the effect of making obligations several, which without them would be joint. The authorities are all the other way.

It has not been made apparent to us that there was any ambiguity in the language of these covenants, and indeed the counsel for the respondents admitted that if these covenants stood alone and uncontrolled by anything else in the instrument, they were free from ambiguity, and were in form joint obligations and should be so interpreted; and being asked on what he relied as coercing us to depart from the words of the instrument and interpret that which was in form and language the joint covenant of the two lessees as being the separate covenant of each, in reply he pointed to the words of the habendum "as tenants in common and not as joint tenants" as giving severally the undivided interest to the lessees, coupled with unity of possession.

The question we have to consider is whether that provision inserted in the habendum, with the apparent purpose of preventing what might be the evil of survivorship as between the lessees, has or ought to have the effect of converting a covenant made by the lessees jointly with the lessor into the separate covenant of each.

The grant was in form joint, and though the words "as tenants in common and not as joint tenants" are found in the tenendum they are immediately followed by a reddendum joint in form and creating primâ facie a joint obligation. No authority was cited on the effect of these words as determining or affecting any right of the lessor, but it was suggested that their effect as between the lessees was to prevent inter se the right of survivorship, and that therefore we should construe the covenants, though in terms expressly joint, as the several covenants of each.

The current of modern decision has been, as we think it ought to be, to adhere to the very words of the contract when they are plain and unambiguous and not to depart from them on grounds of hardship or inconvenience. The contract in such cases represents in its language the intention of the parties, and if they intended otherwise they should have said so. We ought to hold ourselves bound by the express and unambiguous covenant before us, unless coerced by authority to put on it a different construction from that which its words import.

The argument was that we should mould the covenant of the lessees because of their separate interests in the subject matter of the grant, but no decision has been cited going so far. The passage cited from Platt (p. 123) is expressed "shall be measured and moulded according to the interests of the covenantees." No decision to which we were referred goes beyond that.

Slingsby's Case (1) dealt with the several interests of the covenantees, and the illustration put by the Court to some extent shews the reason of the rule in the case of covenantees; and so the rule in *Eccleston* v. *Clipsham* (2) is confined to the interest of the covenantees; and the paragraph in the Touchstone, chapter 7, page 166 (Atherley's edition), founded on *Slingsby's Case*, is to the same effect. There are reasons for the rule applicable to separate interests in the covenantees as regulating the right and the form of suit on the covenant, but no authority has been brought under our notice that the rule was applicable to the case of separate interests in covenantors.

The counsel for the appellants was asked whether he had been able to find any decision applying the rule to the latter case, and he informed us he had not. We do not mean to say that there may not arise cases in which the entirely separate interests of the lessees would render it necessary, in the interests of all parties, to interpret covenants differently from their express words. This is not such a case.

The argument of hardship on the plaintiffs, if the covenants in question are to be considered as joint only, was of course urged. It probably is the case that the advantages which a joint covenant originally afforded to the lessor are now more than counter-

(1) 5 Rep. 18 a. (2) 1 Saund. 153.

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balanced by the disadvantages which, under altered circumstances, now beset the assignees of his estate; but that cannot affect our decision, and the plaintiffs are not without remedies. They may distrain and they may evict. Their rights as reversioners are only interfered with as to an action on the covenants in question.

My Lords, I have, on the whole, come to the conclusion that the covenants in question are free from ambiguity, and are in their language and form joint and not several, that there is nothing on the face of the instrument to warrant us in putting on the covenants any other construction than that which their language imports, and consequently that the decision of the Court of Appeal should be reversed, and the judgment of the Common Pleas Division restored.

LORD HERSCHELL:—

My Lords, I concur in the opinion which has been expressed and have but little to add.

I take it to be clear that where several persons covenant with another in terms which import without ambiguity a joint and not a several obligation, the covenant must be held to be a joint one. Where the terms are ambiguous and may import either a joint or a several obligation, you may no doubt look at the other parts of the deed, the interests of the covenantors, and indeed any other circumstances appearing on the face of the instrument which will aid in the determination of the intention of the parties.

In the present case it appears to me to be free from doubt that the covenant is in form joint. I can see nothing to indicate any several obligation; and if it be free from ambiguity it must, as I have said, be held to be a joint covenant. The only ambiguity which has been suggested, as far as I have heard, has been in the use of the word "their" preceding the words "executors administrators and assigns." An examination of the other parts of the deed indicates, it has been said, that the word "their" is used distributively as referring to each of the persons named. My Lords, I think that this may be admitted without in the least interfering with the view which I have put before your Lordships, that this is a joint covenant. If the word "jointly" were introtroduced into the covenant you would still, I apprehend, find the

words as you find them in the covenant as expressed, "do hereby for themselves their executors, administrators and assigns." In truth the word "their" in such a collocation must always be read distributively, because the parties do not anticipate that they will have the same executors, administrators and assigns, which could only happen in very exceptional cases.

Arriving therefore, as I have, at the conclusion that the covenant is an ordinary form of joint covenant, with nothing to suggest a several obligation, it appears to me to follow that the decision of the Court below cannot stand.

It has no doubt been held that where the interests of covenantees are several, a covenant which in form is joint may be moulded according to those several interests; but that, I take it, is only in the case where, to use the language of Lord Coke, the covenant is to several for the performance of several duties to each of them. Now in the first place I would say that I know of no authority for extending such a doctrine to the case of covenantors. It has always, so far as I am aware, been limited to covenantees; and in the present case the covenant is certainly not one by the covenantors for the performance by each of them of several obligations, inasmuch as the covenant to pay rent (to take that as an example) is a covenant to pay one single rent and not a several rent in respect of his several interest by each of the joint tenants.

FitzGibbon L.J. in his judgment in the Court below said: "What could be more unjust than to construe the words here as creating a joint liability only? We are entitled to insert the definition of the interest in the covenant and to read it as equivalent to 'the lessees, as and being tenants in common, covenant that they or some or one of them will pay the rent.' What could be more unnatural than that if one of these tenants in common became insolvent and the other died wealthy, the executors of the latter could remain in possession of half the demised premises free from all liability upon the covenant?" I may observe that it is not clear that if the executors of one of these tenants in common remained in possession of the demised premises the lessor would be without his remedy. It may be that he would then be able to enforce obligations upon the executors

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of the deceased lessee by reason of privity of estate. But in the present case the executors have assigned all their interest, and have discharged all obligations down to the time of such assignment. The only question is not whether some one can be made liable for the performance of the covenant, but whether the covenant is a several personal covenant so that the representatives of a deceased covenantor may be made liable upon the contract so entered into. I am unable to see that there would be any injustice in holding that during their joint lives neither could be made severally answerable for the rent, it being a single entire rent in respect of the whole of the premises and therefore affecting the interests of both the tenants in common. On the contrary, indeed, it would seem to me to be more unjust that each of them should be liable for the whole of the rent than to hold that they should be only jointly liable for the whole of the rent so long as the two were living.

My Lords, for these reasons I concur in the motion which has been made.

Order appealed from reversed; order of the Common Pleas Division in Ireland restored; the respondents to pay to the appellants the costs both in this House and below, and also to repay to the appellants the costs paid to them by the appellants; cause remitted to the Queen's Bench (late Common Pleas) Division in Ireland.

Lords' Journals 19th March 1888.

Solicitor for appellants: *L. B. Page for Joseph & Charles Ambrose, Dublin.*

Solicitors for respondents: *White, Borrett & Co. for Richard Pope Froste, Dublin.*

[HOUSE OF LORDS.]

THE RIGHT HONOURABLE ARTHUR DE CARDONNEL BARON DYNEVOR } APPELLANT;

AND

GERTRUDE BARBARA RICH TENNANT RESPONDENT.

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Landlord and Tenant—Lease, Construction of—"Heirs or Assigns"—Easement, Regrant of by Lessee—Surrender of Lease—Merger in Reversion.

D. and C., co-owners of an estate, by deed demised for a term of 1000 years a strip of land intersecting the estate for the purpose of making a canal, with the proviso that nothing should prevent D. and C. "their heirs or assigns" from using any of the land demised or any stream of water flowing over the same or from granting any wayleaves across the same for the carriage of goods &c. or for any other purpose in like manner as they could have used the same in case the lease had not been granted, but so as not to injure the canal. The canal was made, and the estate was afterwards partitioned by deed between D. and C., the reversion in a portion of the canal being conveyed to C., and the adjoining lands on each side of that portion being conveyed to D. C. afterwards conveyed the reversion in that portion of the canal to the lessees. D. as owner of the lands intersected by that portion of the canal having claimed to grant wayleaves &c. and build a bridge across it for the purpose of making an access from one side to the other:—

Held, affirming the decision of the Court of Appeal (33 Ch. D. 420), that upon the true construction of the lease the proviso operated as a covenant with D. and C. as owners of the reversion and not as owners of the adjoining lands; that this covenant ran with the reversion; and that when the reversion in that portion of the canal became vested in the lessees there was a merger and the rights under the proviso were extinguished as to that portion of the canal.

APPEAL from a decision of the Court of Appeal (1) affirming the decision of Pearson J. (2).

The facts and documents are set out in the reports of the decisions below. For the present purpose the following brief statement will suffice.

By an indenture of lease in June 1820 Lord Dynevor, H. C. Compton, and S. Doyley, the co-owners of the Neath Abbey estate, demised to George Tennant such parts of the lands therein mentioned as should be deemed necessary expedient or

(1) 33 Ch. D. 420. (2) 32 Ch. D. 375.

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convenient for the purposes of a certain canal for a term of 1000 years at the rent and subject to the covenants therein mentioned. The question in this appeal turned upon the construction of the following proviso in the lease:—

"Provided always and it is hereby expressly declared and agreed between and by the said parties hereto that nothing herein contained shall prevent or hinder the said Lord Dynevor, H. C. Compton and S. Doyley, *their heirs or assigns*, from using all or any of the land or ground hereby demised, or intended so to be, or any stream or streams of water flowing over or through the same, or from granting any wayleaves or roads over or across the same, for the carriage of coal goods wares or merchandises or for any other purpose or purposes whatsoever in like manner as they could or might have used the same in case this present lease had not been granted; but so nevertheless as not to prejudice or injure the said canal intended to be made as aforesaid or the navigation thereof, or any road or towing path, work or works which shall or may be made or constructed for the use or convenience of the same by the said George Tennant, his executors administrators or assigns, under or by virtue of the powers or authorities for that purpose herein contained."

Then followed a clause providing for compensation for surface damage to be estimated by arbitrators, the amount to be paid in addition to the rent in like manner and with the same powers of recovery as were given to Lord Dynevor, H. C. Compton, and S. Doyley, "their heirs and assigns," in respect of the rent.

Other clauses in the lease which bore upon the construction of the words "their heirs or assigns" are sufficiently referred to in the judgments of Lord Halsbury L.C. and the Earl of Selborne.

The canal and towing path were made. In July 1838 the greater part of the Neath Abbey estate (excepting the minerals) was partitioned amongst the then co-owners by a partition deed and a private Act of Parliament. The reversion in a portion of the canal was conveyed to H. C. Compton. The lands on each side of and adjoining that portion of the canal were conveyed to the other co-owners, and the appellant, the present Lord Dynevor, became tenant for life of them.

In 1839 H. C. Compton conveyed the reversion in that portion of the canal to Henry and Charles Tennant in whom the lease of 1820 was then vested, and whose estate and interest in that conveyance and in the lease afterwards became vested in the respondent.

The appellant as tenant for life of the lands intersected by this portion of the canal claimed the right to exercise the privileges conferred by the proviso in the lease above set out, viz., to grant wayleaves and roads and to use and carry goods &c. across that portion of the canal and to build a bridge for those purposes. The respondent having denied the right the appellant brought this action against her, claiming a declaration of the right and an injunction to restrain the defendant from interfering with it.

Pearson J. dismissed the action (1). This decision was affirmed by the Court of Appeal (Cotton, Lindley, and Lopes L.JJ.) on the ground that the right conferred by the proviso was a re-grant to the lessors as owners of the reversion and not as owners of the adjoining lands; and that the reversion in that portion of the canal having become vested in the owners of the term of 1000 years, there was a merger of the term and the right was extinguished as to that portion of the canal (2).

1888. April 23, 24. *Rigby* Q.C. and *Barber* Q.C. (*Edward Bray* with them) for the appellant:—

The proviso in the lease giving the lessors a right of way over the canal operated as the re-grant of an easement. Upon the construction of the lease as well as in point of law that re-grant was a grant to the lessors, not as such, but as the owners of the adjoining lands. This is apparent as a matter of construction, both from the nature of the case and the intention of the parties, as well as from the words used. The object of the proviso was of course, and as the Court of Appeal admitted, to give means of access from one side of the severed lands to the other. Such access would have been of no use to the owners of the reversion in the land demised. The intention is apparent from other parts of the lease, especially the recitals and the proviso for arbitrators to award compensation for damage to the surface of the adjoining

(1) 32 Ch. D. 375. (2) 33 Ch. D. 420.

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lands. The words "their heirs or assigns" also manifest it. "Heirs" no doubt is only a word of limitation, but "assigns" plainly points to the adjoining lands. Neither the reversioners nor their assigns had any need of, nor could they enjoy, the means of access provided. There is no meaning in the clause except with reference to the adjoining lands. The test is what construction will be most advantageous to the grantees. So with the power to grant wayleaves. Difficulties might arise if the owners parted with the adjoining lands to different people, but exactly the same difficulties must arise upon the construction adopted by the Court of Appeal.

Secondly, in point of law the easement could not be granted to the owners of an incorporeal hereditament such as a reversion; there is no instance of such a grant. It is conceded contra that such an easement cannot be created by way of exception or reservation: it must be by grant, and it can only be granted so as to be appurtenant and of service to the dominant tenement. There must be a fitness, a congruity between the easement and the nature of the dominant tenement to which it is attached: e.g. "common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house to be spent there:" see Co. Litt. 121 b, where Lord Coke also says: "Concerning things appendant and appurtenant two things are implied. First, that prescription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unlesse the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." Hargrave and Butler in a note to this say: "This position is not universally true. It sometimes fails as to things appurtenant. . . . The true test seems to be the propriety of relation between the *principal* and the *adjunct;* which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity," citing 1 Ventr. 386. And in respect of interests in real estate, what may be granted may be prescribed for. In *Rangeley* v. *Midland Railway Company* (1) Lord Cairns

(1) Law Rep. 3 Ch. 306, 310.

said: "Every easement has its origin in a grant expressed or implied. . . . There can be no easement properly so called unless there be both a servient and a dominant tenement. . . . There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement."

[LORD HERSCHELL:—Might not this proviso operate as a covenant to permit the lessors, their heirs or assigns, and those holding wayleaves from them, to pass over the land demised? Would it not run with the reversion?]

It would not run with the reversion. Moreover the proper construction of such documents is to treat them not as covenants, but as grants: see per Lord Blackburn in *Russell* v. *Watts*. (1) The thing granted is of the nature of an easement, it is not a parcel of the thing demised; not in esse; it is created de novo, and therefore would not run with the reversion: *Durham and Sunderland Railway Company* v. *Walker* (2). See also *Ackroyd* v. *Smith* (3), which supports the appellants' contention.

[LORD HERSCHELL referred to the note upon the effect of that case by W. H. Willes in Gale on Easements, 5th ed. p. 13. His Lordship also cited *Bush* v. *Calis* (4), where a messuage was demised, except two rooms and a passage "and liberty to wash in the kitchen," and it was held that the lessor could sue in covenant.]

[THE EARL OF SELBORNE:—Where a lessee, as one of the terms of the lease, re-grants a right of sporting or fishing over the demised land to the lessor, his heirs and assigns, would not the right run with the reversion?]

No, it would remain in the lessor.

In *Newcomen* v. *Coulson* (5) the Court of Appeal (overruling Malins V.C. on this point) held that the grant of a right of way was an easement in respect of the dominant tenement as against the servient tenement; and Jessel M.R. observed that if the

(1) 10 App. Cas. 590, 611.
(2) 2 Q. B. 940, 967.
(3) 10 C. B. 164.
(4) 1 Show. 388; S. C. Carth. 232; 12 Mod. 24; also reported as *Cole's Case*, 1 Salk. 196.
(5) 5 Ch. D. 133, 138, 141, 144.

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lands were severed the right would go with every part of the severed lands. So it would be here if the adjoining lands were sold to different persons.

[LORD HERSCHELL:—Assuming your contention to be right that this is a re-grant of an easement to the lessors as owners of the adjoining lands, is it a right for any further period than the currency of the lease, and now that the term is ended by surrender has not the easement ceased?]

A lessee cannot surrender so as to prejudice the rights of others: e.g. a sub-tenant to whom he has sublet. The term though ended for some purposes would subsist for the purpose of supporting the easement: *Saint* v. *Pilley* (1) per Cleasby B. citing Co. Litt. 338 b: "Having regard to the parties to the surrender, the estate is absolutely drowned. . . . But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance." The appellant is a stranger to the surrender. Moreover, the grant must be construed to be not for the duration of the lease, but for a thousand years.

Sir *Horace Davey* Q.C. and *Edward Beaumont* for the respondent were not heard.

April 26. LORD HALSBURY L.C.:—

My Lords, in this case it appears to me that your Lordships need not travel over the very wide field of inquiry which has been suggested in the argument. I think the whole point turns simply upon the construction of the lease, and it might even be more compendiously stated, as turning upon the true construction of one sentence in that lease.

My Lords, it may perhaps be material to consider the object with which the lease in question was granted. I myself am unable to follow the line of argument adopted by the learned counsel in suggesting that the nature of the transaction itself

(1) Law Rep. 10 Ex. 137, 139.

and the object the parties had in view would give a construction to the lease such as they contend for. The lessors were the proprietors of the whole of the land described in that lease, and at that time it was contemplated as an advantage to them that whereas the lessee, Mr. Tennant, wanted to make a canal, the canal should be made through their land. I think there has been some exaggeration in the statement of the learned counsel as to the importance of the land which was intersected, although there is no doubt that considerable portions—pieces of land to the south of the intended canal—would be severed from a great part of the estate. But the owners and lessors were the persons who would remain in complete command of what should be done with the land in question; and inasmuch as the severance, although not so great as I think the learned counsel have contended, would necessarily be an impediment to the most beneficial use of the land, the lessors reserved (I use that word in the popular sense in which it has been used in the argument) to themselves the right of crossing as amply as they could have done before the making of the canal consistently with the use of the canal as a canal, the right of crossing by bridges and other means from one portion of their land to another.

It has been said that they naturally would contemplate that the land so severed might be made use of in such a sense as to bring portions of that adjoining canal into a situation in which it would be almost useless for the land to be occupied without the facilities of crossing they reserved to themselves, and I quite agree that that would be so. I have no doubt that the provision in question, whether spoken of as a reservation or as a re-grant, would be essential for the proper and most beneficial use of the land on both sides of the canal; but the inference which is derived from that seems to me to be one which is not maintainable. Those who were possessed of the land were not giving the dominion over that or any other part of the land to anybody else. It still remained in themselves. It is perfectly obvious that they might make such provision as to them might seem fit for the purpose of rendering the land bordering upon the canal capable of being used in the most beneficial manner to the rest of the estate. Certainly I should have thought that the

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very last thing that would have occurred to anyone as a contingency against which it was necessary to provide would be a partition of the land which should divide portions of the canal—the only use of which could be as a navigable canal—which, as I say, should divide that into pieces and appropriate it to different proprietors after the partition.

Such being the nature of the land to be dealt with one comes to see what the provisions made were; and I think the whole of the argument may be compendiously stated as depending upon the construction to be placed—I did say on one sentence—but I might say on one word in the provision in question, and that one word is the word "assigns." Assigns of what? Assigns of the reversion. If so it is admitted that the argument of the appellant is untenable. But it is said that in that particular portion of the lease in question the word "assigns" is to be read as "assigns of the adjoining lands."

There are several occasions in the course of the instrument in question where the word occurs. One is in the covenant, which says: "The said George Tennant doth hereby for himself," and so on, covenant with the lessors "their heirs and assigns" to pay the rent. In that place there can be no doubt —it is not open to argument,—that it refers to the assigns of the reversion. We come, then, to the provision in question which for the moment I will leave, and we then come to the place where it again occurs with reference to the arbitration clause, and I confess it seems to me that that is all but conclusive as to the true construction to be placed upon the instrument; because apart from the difficulty there might be in obtaining the assent of others, assigns of the adjoining lands, to such an arbitration in one event, or the difficulty of proceeding without it in the other event, the language of the instrument appears to me conclusively to shew that the draftsman had supposed he had exhausted all the interests with which he was dealing, and had provided for a representative of each of those interests in the arbitration clause in question. The provision is that there should be three arbitrators—that one should be appointed by those representing the lessor's interests—that one should be appointed by those representing the lessee's interests, and that

those two should appoint a person whom they call the third arbitrator—who is obviously intended to be an umpire between the two. The draftsman supposed that he had in that way provided for all the interests which could arise upon the hypothesis that that provision should come into operation.

The case seems to me to turn upon the simple question I have mentioned, and if I am right in assuming that both before and immediately after the provision in question these words "heirs and assigns" are to be read in the sense of heirs and assigns of the reversion, it would be a very curious construction to suppose that interposed between those two provisions there should be a provision (the one in question) in which we are to attribute a different sense to the very same words in the same instrument, without, as I have endeavoured to shew, the slightest reason for making such a difference in the meaning of the words used.

My Lords, I confess I am a little surprised that the argument has extended to such a length, considering the very narrow point upon which it turns. It seems to me almost impossible to contend that the construction of the instrument is other than that which I have suggested to your Lordships. On that short and simple ground I move your Lordships that this appeal be dismissed, and that the judgment of the Court below be affirmed

EARL OF SELBORNE :—

My Lords, this is, in my view, a question of construction only. The clause to be construed is in a lease, in a contract between landlord and tenant, under seal. It is, for all practical purposes, immaterial whether it operates technically by way of regrant from the lessees to the lessors, or by way of covenant. If it does not operate by way of regrant (it was contended that it could not so operate, unless there were some dominant tenement, distinct from the reversion of the lands demised, in favour of which a servitude would be created, an argument as to the validity of which I express no opinion), if it does not operate by way of regrant, it is, at all events, a covenant, and a covenant concerning the land demised, which, as between the lessors and the lessees, would, beyond all question, run with the land. These points appear to me to be so clear and certain, that I think it

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superfluous to go into any authorities about them. And, this being so, the contract as it is expressed ought to receive effect according to its true construction, and not otherwise, whatever that construction may be.

The lease is of land, not ascertained by specific designation, of so much of certain marsh land, part of a considerable estate called the Neath Abbey estate, on which there were copper-works and an iron-foundry, as might be necessary to make a canal, by which (when made) that estate would be intersected. The subject, therefore, of the demise was, within certain limits, to be ascertained by the option of the lessees. It was of importance to the interest of the lessors (who were joint tenants, or tenants in common, of the Neath Abbey Estate), that their adjoining lands on each side of the intended canal should be as little as possible prejudicially affected by the severance which the canal would make: and, with this view, it was agreed, in the first place, that certain streams and waters should be excepted from the demise; and, in the second place, that the lessors should be entitled to exercise certain rights over the land demised. The clause by which the latter of those objects was to be accomplished is that now under construction; and the sole question is, whether it creates an easement or easements over the land demised, as appurtenant to the adjoining riparian lands of the lessors which were not demised, in favour of the lessors as owners of those lands and of all persons who might derive title from them to any parts or part of those lands, by descent, demise, or assignment: or whether it is merely a contract between the lessors and the lessees of the land demised, as to the use of the land demised, in which the lessors, in respect of their reversion and those to whom the reversion might come by descent or assignment from them, had the sole interest. The latter construction is that placed upon the clause, and, in my opinion, rightly, by the Court below.

Now, my Lords, without dwelling in much detail upon any other parts of the instrument than that immediately before us requiring construction, I would observe, that the part to which I have already referred, obviously introduced by way of exception for similar reasons, is also expressed in somewhat similar

language. I mean the exception out of the demise of "all brooks, rivulets and streams of water flowing or to flow over or through the land or ground hereby demised," which were or might be used for certain mills or machinery, with full liberty for the lessors, "their heirs or assigns, to divert or turn, or otherwise use such brooks, rivulets, or streams of water, or any of them, in like manner as they could or might have used the same if this present lease had not been granted:" a form of expression material, I think, to the construction of the later clause with which we have more immediately to do. That clause is thus expressed: "Provided always and it is hereby expressly declared and agreed between and by the said parties hereto, that nothing herein contained shall prevent or hinder" the lessors (they are named) "their heirs or assigns" (which are the words really under construction) "from using all or any of the land or ground hereby demised or intended so to be, or any stream or streams of water flowing over or through the same, or from granting any wayleaves or roads over or across the same for the carriage of coal, goods, wares or merchandises, or for any other purpose or purposes whatsoever, in like manner as they could or might have used the same in case this present lease had not been granted, but so, nevertheless, as not to prejudice" the canal.

Two things are observable in that clause upon the very face of it. The one is, that they desire to reserve as they had it before, whatever it is that they reserve or stipulate for, (I use the word "reserve" of course in the popular sense), not as a new thing to be newly granted and brought into existence for the first time, but as far as possible as they had it before, in the same manner as if the lease had not been granted. It is the same language which was used in the words of exception.

The next thing is, that this is not a lease which creates merely some specific easement, as if, for instance, it had been confined to "wayleaves or roads over or across the land for the carriage of coal, goods, wares or merchandises" (which words I take to be a qualification of "wayleaves" only, and not of what went before), but it is much larger; it is not to prevent them "from using all or any of the land or ground hereby demised or intended so to be," as if there had been no lease. As I said during

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the argument, although beyond all doubt the lease does operate by way of demise of particular lands, yet the object is, on the one hand, to restrict as far as possible the use of the demised lands by the lessees to the particular thing—the canal, almost as if they had an easement and not a demise, and, on the other hand, to retain in the largest manner, in the freest and most absolute manner consistent with the existence of the canal, all such rights convenient to them as the lessors would have had before.

I cannot help thinking that an object which much more naturally points to a reservation in respect of the land demised, than to an easement or servitude in favour of other land; and accordingly the words are not merely "heirs or assigns," which in every other place in the deed distinctly mean the heirs and assigns of the lessors under the lease, in other words the persons entitled to the reversion, but the whole subject-matter of this clause is the locus in quo, the land demised, and no reference whatever is made in it to anything else. It is not to prevent them from using what? "All or any of the land or ground hereby demised" or "any stream or streams of water flowing over or through the same," (which streams were the things within the exception) "or from granting" to other people "any wayleaves or roads over or across the same." It is not that they reserve to themselves wayleaves or roads, they reserve to themselves something much larger, and they also reserve to themselves the power of granting to other people wayleaves or roads.

My Lords, it appears to me, according to all principles of construction, that this is not intended to be on either side a grant of a privilege to be enjoyed together with the adjoining property, and to follow the title of the adjoining property, but it is a reservation by the lessors in that character in respect of their interest as lessors and to be enjoyed by those persons who are throughout the lease everywhere else spoken of as their heirs and assigns.

I do not mean to go through all the clauses of the lease which mention "heirs and assigns," but it is certainly a corroboration of that construction, not only that in all the places where the

words "heirs and assigns" occur they would from the nature of the subject necessarily mean the lessors and the heirs and assigns of their reversion, but that when we come to the clause which provides for compensation for such damage as may have unavoidably occurred in the construction of the canal we are led to ask in whose favour is that? In the view of the appellant it would be reasonable that everybody, all the riparian owners, if the title became divided, should have that benefit. It is perfectly clear that it is a stipulation in favour of the same persons who are to receive the rent under the lease; and the words, "heirs and assigns" there mean those persons and nobody else.

Furthermore, there is another stipulation, that no rights are to be given to some competitors in business, the owners of the Duffrin estate, in respect of the carriage of coal across the canal. In whose favour is that? It is not to be "without the consent in writing of" the lessors "their heirs or assigns first had and obtained." That cannot possibly mean that if they build a great number of cottages along the margin, or other houses, and sell off the property or in any other way divide it, the consent of all these persons their heirs or assigns is to be required to a concession to the owners of the Duffrin estate. It is perfectly plain that they contemplate the continuance of the estate in the present possession and unity of ownership. The same thing is clear from the memorandum; supposing that the lessees should wish to sell the canal, they are not to sell it without giving the right of preemption to the lessors their heirs or assigns. That clearly means persons who would be entitled to the reversion; and I do not see any difficulty arising from the practical consequences; because, as long as the unity of ownership remained, they would have for the benefit of their adjoining lands, no doubt, for every purpose beneficial to them, quocumque modo, whatever the construction might be, the benefit of this proviso.

It is said that they might make, as they did make, this partition—they might sell. Well, that was all within their power. They having the rights which they have under this lease, it is their own fault if they do not guard them in the way most beneficial to themselves whenever afterwards they deal in any manner with the estate; as long as they themselves do nothing

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to make this reservation (I call it so) less beneficial to them than it was originally it will remain; and if they do so, it is only their own want of consideration, their own improvidence, not before the lease, or at the time of the lease, but in the course of subsequent events which were entirely within their own power.

My Lords, for these reasons I am of opinion that the judgment appealed from ought to be affirmed.

LORD FITZGERALD:—

My Lords, upon the question of the proper construction of this lease, or rather of the provision in this lease which is under consideration, I concur with my noble and learned friend on the woolsack, and with the noble and learned Earl who has preceded me. I am clearly of opinion that in the construction of that provision it is to be read as a reservation in favour of the lessors in respect of their reversion and the assignment of their reversion. Accordingly it follows that the decision of the Court of Appeal ought to be affirmed. I will only add that if we adopted the construction put upon this provision by the appellant the rights in regard to this canal would become complicated and extremely confusing.

LORD HERSCHELL:—

My Lords, I am of the same opinion. I only desire to add that where a covenant or regrant is taken, as here, to and for the benefit of the lessors, even though it be in relation to other lands owned by them, I am not satisfied, as at present advised, that the rights conferred by it endure longer than the lease, however the lease may come to an end. The dealings with the other lands as well as the reversion are entirely in the hands of the lessors and they have full control over them. It is not clear that in such a case the doctrine applies that a right acquired by third parties under a lease cannot be prejudiced by a surrender of it by the lessees to the lessors. It is not necessary to pronounce an opinion upon it, but I desire to guard against its being supposed that the point is determined by the judgment of this House.

LORD MACNAGHTEN :—

My Lords, I quite agree. It appears to me that the clause in question was intended to operate and was operative according to its tenor as a covenant with the reversioners. In its terms and in its scope it is much wider than the grant of an easement. It seems to have been intended to reserve to the lessors the whole beneficial enjoyment of the property demised except so far as that property might be required for the purposes of the undertaking proposed by Mr. George Tennant. The most convenient and proper if not the only mode of effecting that object was, I think, the mode adopted—a covenant with the lessors as landlords. That the covenant is not available at this moment for the purpose for which Lord Dynevor seeks to use it, is the consequence of the acts of the lessors, not the fault of the lessees.

I only wish to add that it seems to me that the authorities which lay down the principle that a lessee cannot by his voluntary act prejudice rights which he has created for value, have no application to the present case.

Judgment appealed from affirmed and appeal dismissed with costs.

Lords' Journals 26th April 1888.

Solicitors for appellant: *Warrens.*
Solicitors for respondent: *Finch, Jennings, & Finch.*

[HOUSE OF LORDS.]

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CHARLES ROBERT LEADER AND HENRIETTA ADA LEADER . . . . . } APPELLANTS;

AND

GEORGE F. DUFFEY AND AMYATT EDMOND RAY . . . . . } RESPONDENTS.

Marriage Settlement—Construction—Power of Appointment—Objects of Power—"Issue then in being"—Vesting of Estate, Time of.

By a settlement made on his marriage, the settlor granted freehold lands to trustees upon trust for himself for life and after his death to convey the lands and pay the rents and profits "unto or for the benefit of all and every or any one or more child or children, or any grandchild or grandchildren or other issue *then in being* of the said intended marriage" for such estate or interest and in such shares and subject to such conditions as the settlor should by deed or will appoint.

There was issue of the marriage several children who all attained twenty-one. The settlor appointed a portion of the lands to his eldest son, then of age, his heirs and assigns, and joined with him in mortgaging this portion. The son having died in his father's lifetime:—

Held, affirming the decision of the Irish Court of Appeal (*In re Leader's Estate* 17 L. R. Ir. 279), but without deciding any question upon general rules of construction, that upon the true construction of the settlement the words "then in being" governed only the words "grandchild or grandchildren or other issue," and not the words "child or children;" that the appointment was therefore valid, and that the fee passed under the mortgage.

APPEAL from a decision of the Court of Appeal (1) in Ireland.

By a marriage settlement made in June 1841 on the marriage of Henry Leader and Maria Miller lands in the county of Cork, of which Henry Leader was seised in fee, were conveyed to trustees upon trust for Henry Leader during his life, and after his decease and subject to a jointure for his widow, "in trust to convey, release, and assign the same respectively, and pay and apply the rents, issues, and profits, and income thereof unto or for the benefit of all and every, or any one or more child or children, or any grandchild or grandchildren or other issue

(1) 17 L. R. Ir. 279.

then in being of the said intended marriage; for such estate or interest, and in such parts, shares, and proportions if more than one, and in manner and form, and subject to such charges and payments by any one or more to any other or others of them, and to vest in respectively, and the rents and annual income thereof to be payable and paid at such age or ages or days or times, and upon such contingencies, and with, under, and subject to such restrictions and conditions and such powers, directions, and regulations for maintenance, education, advancement, or otherwise, as he the said Henry Leader at any time or times and from time to time during his life by any deed or deeds, writing or writings, with or without power of revocation, to be by him signed, sealed, and delivered in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by three or more credible witnesses, shall direct, limit, or appoint:

"And in default of such direction, limitation, or appointment, and as to such part of the said trust estates and premises to which the same shall not extend, and when any such as shall be made shall end and determine, then upon trust that" the trustees "shall convey, release and assure the lands unto, between, and amongst all and every the children, or if an only child such only child of the said intended marriage, who shall be living at the time of the decease of the said Henry Leader, or be born within due time afterwards, equally between and amongst them, if more than one, share and share alike as tenants in common, and his, her or their heirs, executors, and administrators, according to the respective nature and quality of the said estates and property, as and when such of the said children, or such only child, shall attain their, or his or her respective ages or age of twenty-one years:

"Provided always that in case any or either of the said children shall attain such age as aforesaid during the lifetime of the said Henry Leader, and shall afterwards depart this life leaving lawful issue living at the time of the decease of the said Henry Leader, then and in such case the children or child who shall so

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die leaving lawful issue shall, in default of such appointment as aforesaid, be considered as having acquired a vested interest in the share or shares which he, she, or they would have been entitled to under the trusts hereinbefore last mentioned, in case he, she or they had been living at the time of the decease of the said Henry Leader. And the same or a like share or proportion of and in the said trust premises, shall go and belong to such issue in like manner as if his, her, or their respective parent had been living at the time of the decease of the said Henry Leader:

"And upon this further trust, that after the decease of the said Henry Leader, and during the minority of any child or children or other issue of the said intended marriage, entitled to a portion or portions under any of the trusts hereinbefore declared" the trustees should apply so much of the rent and income arising from the portion or share of each of the said children, grandchildren, or issue as Maria Miller, if then living, should appoint, or if Maria Miller should not then be living, then at the discretion of the trustees in and for or towards the maintenance, education, and advancement of the said child, grandchild, or issue, and in such manner as Maria Miller, if then living, or if not, as the trustees should think fit:

"And in case there shall be no child of the said intended marriage or no child who shall attain the age of twenty-one years, or die under that age leaving lawful issue at his death, or born within due time thereafter, then upon trust," to convey and assure the lands unto Henry Leader, his heirs, executors, administrators and assigns.

There were six children of the marriage, all of whom attained twenty-one. Nicholas John, the eldest, was born in April 1842. Maria Leader died in 1862. By deed in September 1863 Henry Leader appointed a portion of the settled lands to the use of his eldest son, Nicholas John, his heirs and assigns. By deed in 1872 Henry Leader and Nicholas John mortgaged this portion of the lands for £8000 to persons now represented by the respondents.

Nicholas John died in 1877 never having been married.

The mortgagees having obtained on the 29th of March 1882 from one of the Judges of the Land Court an absolute order for

sale of the mortgaged lands, Judge Flanagan on the 5th of August 1885, on the application of the appellants, the two surviving children of the marriage, discharged that order save so far as it directed a sale of the life estate of Henry Leader.

On appeal the Court of Appeal in Ireland (Palles C.B. and Fitzgibbon and Barry L.JJ., Naish L.C. dissenting) made an order which declared that upon the true construction of the settlement of 1841 the objects of the power of appointment were not confined to the children or remoter issue of the marriage living at the time of the death of Henry Leader, but extended to children who predeceased him, and accordingly discharged the order of Judge Flanagan (1).

Against this decision the two surviving children of the marriage appealed.

Feb. 14, 16. *Rigby* Q.C. and *G. Henderson*, for the appellants:—

In the clause creating the power the words "then in being," which admittedly mean living at the death of the settlor, Henry Leader, must be read as referring to all the objects of the power, so as to exclude from the benefit of an appointment all children, grandchildren, and other issue who died in his lifetime. The contention on the other side is that those words are to be construed as applying only to grandchildren and other issue, and that they were used to bring the power within the rule against perpetuities. But in the first place they are unnecessary for that purpose, as the law would imply the limitation, however large the power might be in its terms; and secondly they go beyond the requirements of the rule, which would permit an appointment to an object born within twenty-one years after the settlor's death. The appellants' construction is the natural one if the clause be looked at apart from the context. Thus the direction to "convey, release, and assign" and "pay" is in its favour, for it would be impossible to convey, &c., to a dead appointee: *Selby* v. *Whittaker* (2) where there were similar words. Then "other" issue must mean issue other than children or grandchildren, it cannot include children; it follows that the words "then in being," if they apply to grandchildren, as it is

(1) 17 L. R. Ir. 279. (2) 6 Ch. D. 239.

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conceded they do, must also apply to children. The context also supports the appellants' view. The frame of the gift in default of appointment, under which only those children take who either by themselves or by their issue survive the settlor, is some evidence of an intention to impose a similar restriction on the exercise of the power. There is no more reason for allowing an appointment in favour of a child dying in the husband's lifetime than in favour of issue so dying. To do so would open the door to illusory appointments in favour of infant children, the appointor taking the chance of their dying before him, when he would succeed as heir or next of kin and so defeat the settlement. The risk of such proceedings would be greater in the case of children than in that of more remote issue, as the appointor would have a better chance of surviving.

The cases which are relied upon as establishing a canon of construction unfavourable to the appellants fall into two classes. The first class consists of decisions founded on *Emperor* v. *Rolfe* (1), as to the meaning of the words "due and payable" in settlements. The actual decision in *Emperor* v. *Rolfe* (1) was that the settlor had himself construed the words by using them elsewhere in the instrument in the sense of "vested," but it has been extended into a rule of construction of those words when found in settlements: *Wakefield* v. *Maffet* (2). These authorities have no direct bearing here, as the particular words are not in question. They do, however, rest on a presumption in favour of the vesting of children's portions, where the Court is construing a gift in default of appointment. But such a presumption ought not to be extended to a power of appointment: when applied to a trust in default of appointment, it tends to equality of distribution, when applied to a power it tends to inequality.

The other class of cases proceeds upon the same presumption in the construction of settlements generally. *Woodcock* v. *Duke of Dorset* (3) is the leading authority. Lord Cottenham in speaking of that case in *Whatford* v. *Moore* (4) said that it had "always been considered as carrying the doctrine to its utmost limits," and his observations upon it are quoted with approval in *Jeyes* v.

(1) 1 Ves. Sen. 208.
(2) 10 App. Cas. 422.
(3) 3 Bro. C. C. 569.
(4) 3 My. & Cr. 270, 289.

Savage (1) by James L.J., who lays down that it is the duty of the Court to give effect to words confining the gift to children who survive their parents, unless the instrument contains something to support a construction including all children who attain twenty-one. The principle is that vesting shall take place at twenty-one or marriage if there are words from which that intention can be inferred from plainly expressed words. But the intention is not to be inferred where the words are ambiguous and such a construction would not be rational. In *Howgrave* v. *Cartier* (2) the same result would have followed without applying the principle of construction relied on by the respondents.

A strong argument arises in favour of the appellants from the terms of the gift in default of appointment, which are inconsistent with the respondents' contention: see the judgment of Naish L.C. in the Court below (3), who also disposes of the argument contrà derived from the terms of the gift over.

Sir *Horace Davey* Q.C. and *G. R. Price* (of the Irish Bar) for the respondents:—

This is a marriage settlement whereby the settlor intends to provide for his family. In such settlements and all settlements made by a person in loco parentis under a moral obligation to provide for a class the Court approaches the question with a presumption in favour of a particular construction: *Emperor* v. *Rolfe* (4); *Howgrave* v. *Cartier* (2); *Wakefield* v. *Maffet* (5), and the cases there cited. The presumption, supposition, or leaning in such case is that the settlor intends to make provision for the children in such a form that they shall get it at the time when they are most likely to want it, at twenty-one in sons, and marriage in daughters. This presumption is a general one, and not confined to the cases referred to on behalf of the appellants. Where the words are ambiguous the Court will not adopt that construction which makes it impossible to provide for children at the time when they most want it. Here the gift over is strongly in favour of the respondents' construction; and

(1) Law Rep. 10 Ch. 555, 563.
(2) 3 V. & B. 79.
(3) 17 L. R. Ir. 290.
(4) 1 Ves. Sen. 208.
(5) 10 App. Cas. 422.

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in such a case the Court will modify the words by the gift over: *King* v. *Hake* (1); *Swallow* v. *Binns* (2). The words "then in being" grammatically apply only to the second class—"grandchild or grandchildren or other issue." If they had been intended to apply to "child or children" they would have been placed after instead of before the words "of the said intended marriage." The reason for inserting the words was both to observe the rule against perpetuities, and to insure that the period of distribution should not be delayed. In Bythewood and Jarman's Conveyancing, vol. ix., Settlements, ed. 1833, pp. 137, 138 (the precedents in use when this settlement was drawn) the form given is, "In trust for all or any one or more of the children or the grandchildren or other issue of the said" parents ("such grandchildren or other issue to be born in the lifetime of the said" parents "or one of them.") The draughtsman in the present case no doubt meant the same thing but tried to be concise and blundered. See also page 202 of the same volume for similar words. It is said contrà that the words "then in being" must mean "surviving," but their primary meaning is "then born"; and the object was to observe the rule against perpetuities. Though not necessary it is not unusual to do so in order to call the attention of settlors who may not know the law: see Davidson's Precedents ed. 1873 vol. iii. part 2 pp. 714, 778.

Henderson replied.

The House took time for consideration.

May 14. LORD HALSBURY L.C.:—

My Lords, I am very glad that in the view which I take of this case I am not called upon to resort to those rules of construction upon which so much has been said at the Bar and in the Courts below. The imperfection of human language as an instrument for giving expression to precise and definite thought is not much aided by giving the same words in the same instrument a different meaning when used by a person in loco parentis from

(1) 9 Ves. 438.

(2) 1 K. & J. 417.

the meaning the same words would bear if used by a stranger in blood to the objects of his bounty.

I think there could be no better illustration of the difficulty of applying such rules of construction to any instrument than the contrast between the language of Lord Hatherley in *Swallow* v. *Binns* (1) and Sir John Leach in *Bright* v. *Rowe* (2) and Sir George Turner in *Farrer* v. *Barker* (3). One learned judge speaks of "a necessary inference" and "an implication of law" and of the Court "leaning strongly" in favour of this or that supposition; while other learned judges place restrictions on the rule by the declaration that "the Court is not to go out of its way by a forced construction to raise this implication," admitting that the implication must be "upon the natural and plain construction of the words"; and, to use Sir John Leach's expression, "the rule is not to be one of arbitrary construction."

All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view—which is I think in accordance with reason and common sense—that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made.

The words which your Lordships are called upon to construe are those in respect of which Henry Leader made an appointment in favour of his son Nicholas John. This son died in his father's lifetime, and the question is whether the appointment made by the father was an effectual execution of the power.

The words to be construed are these: "Unto or for the benefit of all and every or any one or more child or children or any

(1) 1 K. & J. 417. (2) 3 My. & K. 316.
(3) 9 Hare, 737.

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grandchild or grandchildren or other issue then in being." I think every one of the learned judges who have construed this settlement have assumed that the word "then" applies to the time of the death of the tenant for life, and I agree with Palles C.B. that the objects of the power are divided into two classes, and that the words "then in being" do not relate to the first class if the words are looked upon in the light of strict grammatical construction, or even without regarding strict grammar, if one considers what would have been the language if the meaning had been that which is contended for by the appellants. It seems to me that to apply the words "then in being" to the first class is what no one would do if they were reading the sentence in any ordinary writing with their minds untainted by technical considerations. Indeed I find that the Lord Chancellor of Ireland, although I think he somewhat understates the proposition, says that "it would be possible without offending against the rules of grammar to read the words 'then in being' as not applying to the earlier portion of the clause, so as to authorize an appointment to any child of the marriage, and also to any grandchild or other issue then (that is, at the time of Henry Leader's death) in being, so as to render it permissible to appoint to the children irrespective of whether they survived or not; but to the other issue in case only of their being in existence at the time of Henry Leader's death." I am, however, unable to agree with his Lordship that the words "then in being" if they govern part ought naturally to govern the entire sentence.

Having come to the conclusion that what I have indicated is the true construction of the power itself, I am wholly unable to draw from any other part of the instrument anything which could induce me to depart from the natural meaning of the words, and apart from any rules of construction which are binding on your Lordships, and from which, as I have already said, I think this instrument is free.

I do not think much is gained by references to authority, since each case turns upon forms of expression in the circumstances contemplated by the framer of the instrument, which may or may not commend themselves as reasonable in the instrument in which they are found, and without reference to the circumstance that

the framers of them are contemplating, but which can have no weight or authority beyond the instrument then under construction.

I am therefore of opinion that the judgment of the Court of Appeal is right, and I certainly do not think that this decision "defeats upon technical rules of construction the deliberate intention of the framer of and parties to the settlement." On the contrary, I think it follows plain rules of grammar and gives effect to words in their ordinary and natural meaning. I am quoting from the language of Barry L.J., who, notwithstanding the misgiving which he expressed in the language I have quoted, agreed with the majority of the Court of Appeal. I think his Lordship's phrase that the decision "gives effect to a device resorted to for the purpose of enabling the tenant for life to recapture the property which he had ostensibly settled for the benefit of his family," rather points to a fraud upon the power than to any question of the proper construction of the instrument.

I move your Lordships that this appeal be dismissed, and the judgment of the Court of Appeal in Ireland be affirmed with costs.

LORD HERSCHELL :—

My Lords, the question raised by this appeal is whether the respondents are entitled to the benefit of an indenture of mortgage of the 3rd of December 1872, and consequently to an order for the sale of the lands conveyed by it. These lands were comprised in a settlement made on the 12th of June 1841 on the occasion of the marriage of Henry Leader with Maria Miller, by which a power of appointment was conferred upon Henry Leader, which he purported to exercise in favour of his son Nicholas John Leader. And the controversy turns upon whether this appointment to Nicholas John Leader was a valid exercise of the power. The contention of the appellants is that it was not, inasmuch as that gentleman was not living at the time of his father's death. The only question which has to be determined is whether the power of appointment is to be construed as limiting the objects of the power, so far as children are concerned, to those living at the time of distribution, viz., the death of the tenant for

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life. Much reliance was placed by some of the judges in the Court below on the rule or doctrine that where a parent, or person in loco parentis, makes a settlement for the benefit of children, it is to be presumed that they are intended to enjoy that benefit in the case of sons on their attaining twenty-one, and in the case of daughters on their attaining that age or marrying. This rule or doctrine is said to influence the Court to put, if it be possible, such a construction upon the settlement as will carry this presumption into effect. The learned counsel for the appellants contended that the decisions referred to were limited to the question when the gifts conferred by the settlement vested, and had no application where the provision to be construed was a power of appointment conferred upon the settlor.

My Lords, in the view which I take it is unnecessary to pronounce an opinion on this point. The power of appointment which has to be construed is in the following terms:—

"From and after the decease of Henry Leader .... upon trust that they the said William Leader and Henry Maxwell Miller, and other the trustees or trustee for the time being, and their assigns, do and shall stand and be seised and possessed of all and singular the said lands, hereditaments and premises herein and hereby released, conveyed, and assigned..... In trust to convey release, and assign the same respectively, and pay and apply the rents, issues, and profits and income thereof unto or for the benefit of all and every or any one or more child or children, or any grandchild or grandchildren, or other issue then in being of the said intended marriage, for such estate or interest, and in such parts, shares, or proportions, if more than one, ... and with, under, and subject to such restrictions and conditions, and such powers, directions, and regulations for maintenance, education, advancement, or otherwise, as he, the said Henry Leader, at any time or times, and from time to time during his life by any deed or deeds, writing or writings .... shall direct or appoint."

The objects of the appointment, it is to be observed, are to be, "any one or more child or children, or any grandchild or grandchildren or other issue then in being of the said intended marriage." There can be no doubt that the word "then" refers to

the time of the death of the tenant for life. But the controversy turns upon the meaning of the expression "in being," and whether the words "then in being" are to be read in connection with "all or any one or more child or children," or whether they are a qualification only of the words "any grandchild or grandchildren, or other issue," which immediately precede them. The respondents contend that the power of appointment amongst the children is absolute, and not controlled by the term to which I have called attention. And I think their contention is well founded. I remark in the first place that the words are not "then living," but "then in being," and that this latter expression points rather to the objects of the power having come into existence at the time of the death of the tenant for life than to their continuing in existence at that date. The words "in being" are equivalent to the well known legal expression "in esse," that is to say, born or about to be born. Sir Horace Davey pointed out that in the form of a settlement to be found in Jarman's Bythewood's Precedents, vol. ix., p. 137, a limitation of a power very similar to that under consideration is to be found couched in the following terms: "in trust for all or any one or more of the children or the grandchildren or other issue (such grandchildren or other issue to be born in the lifetime of the said intended husband and wife, or one of them), for such interests," &c.

In the next place it is to be observed that the words "then in being" are, according to the natural construction of the language used, connected only with the words which immediately precede them, and not with the earlier limb of the sentence. If they had been intended to qualify these words also, one would have expected the sentence to run thus: "all and every one or more child or children, grandchild or grandchildren, or other issue." As the clause stands in the settlement the words "or any" before "grandchild" make a fresh starting point. Their insertion is intelligible if they were intended to introduce a distinct enumeration to which alone the qualifying words which follow were to apply, whilst upon the appellants' contention they are unnecessary and meaningless. And if the expression "then in being" have the meaning I have indicated, the reason for separating the children from the grandchildren and other issue, and applying

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the condition to the latter only, is manifest. The children must all be in esse at the time of the death of the father; the grandchildren or remoter issue might or might not be. I think the object was to limit the power of appointment as regards issue other than children to a class ascertainable at the date of distribution, that is to say, to those who had then come into being. This construction puts, I think, the natural meaning upon the language used, and makes every part of the clause consistent and intelligible.

In this view of the provision to be construed there is no ambiguity which compels a resort to any other part of the instrument. But I may add that in my opinion nothing is to be found there inconsistent with it. Upon this simple ground I am prepared to affirm the judgment of the Court below.

LORD WATSON:—

My Lords, I entirely concur in the judgment just delivered by the noble and learned Lord, which I have had an opportunity of considering in print. It disposes of the case upon a very plain and simple ground, and makes it unnecessary to express any opinion upon those larger questions which were so ably and learnedly discussed in the Irish Court of Appeal.

LORD FITZGERALD:—

My Lords, I concur in the result which the Lord Chancellor has indicated in his judgment.

I have also had the advantage of reading the concise judgment just delivered by my noble and learned friend opposite (Lord Herschell), and I adopt his reasoning and his conclusions.

Mr. Rigby in opening the appeal said that there was but one question, viz. the true construction of the power of appointment contained in the settlement of the 12th of June 1841, and he urged that the great mass of the authorities referred to in the Court below would be found to have but little bearing on that question. If we can arrive at a reasonable construction of the language in which the power is expressed without adding or

striking out any words or doing any violence to the apparent intention of the parties, that construction ought to govern.

The Chief Baron in his judgment, after pointing out that the word "*then*" in the passage "*then* in being" refers to the death of the tenant for life puts the question thus: "What is the subject-matter to which the words 'then in being' refer? Is it the entire class within the power—children, grandchildren, and other issue? in which case the order below was right; or is it grandchildren and other issue only? in which case the appeal should be allowed." And after a most elaborate and learned discussion of the question he thus states his opinion: "I consider that the words 'then in being' are primâ facie restricted to grandchildren and remoter issue only; secondly, so far from finding an indication on the face of the instrument of an intention to extend these words 'then in being' to children, I find an indication of an intention which would be defeated by such a construction of the words." My Lords, I entirely agree with the Lord Chief Baron in the opinion so expressed, and arriving at that conclusion I adopt Mr. Rigby's view, not to the extent that the authorities have no bearing, but that it is unnecessary to consider them or to follow further the very learned and able judgments delivered in the Court of Appeal.

There are obvious reasons why the power to appoint to "any grandchild or grandchildren or other issue" should be restricted to objects ascertainable at the time of distribution.

I am of opinion therefore that the order of the Court of Appeal should be affirmed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals May 14th 1888.

Solicitors for appellants: *Ingledew, Ince, & Colt, for G. Harley, Cork.*

Solicitors for respondents: *Reyroux, Phillips, & Golding, for Davis & Montfort, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.) 1888 June 11.

ALEXANDER ADAM & ROBERT SMITH ADAM . . . . . } Appellants;

AND

WILLIAM NEWBIGGING & WALTER TOWNEND . . . . . } Respondents.

Contract induced by Misrepresentation—Rescission of Contract—Restitutio in Integrum—Indemnity—Damages—Partnership.

The respondent was induced by misrepresentations made without fraud by the appellants to become a partner in a business which either belonged to them or in which they were partners and which was in fact insolvent. The business having afterwards, owing to its own inherent vice, entirely failed with large liabilities:—

Held that the respondent was entitled to rescission of the contract and repayment of his capital, though the business which he restored to the appellants was worse than worthless, and that the contract being rescinded the appellants could not recover against him for money lent and goods sold by them to the partnership.

The decision of the Court of Appeal (34 Ch. D. 582) affirmed, but without deciding whether the appellants were liable to indemnify the respondent against the general liabilities of the firm.

APPEAL from a decision of the Court of Appeal (1) (Cotton, Bowen and Fry L.JJ.) affirming a decision of Bacon V.C.

In an action brought by the respondent Newbigging against the appellants the statement of claim alleged that the plaintiff had been induced by the defendants' misrepresentations to enter into a partnership with them and Walter Townend (the other respondent in this appeal), and claimed (inter alia) an indemnity against all claims and demands in respect of the partnership or the liabilities thereof; repayment of the capital brought in by him with interest: or alternatively damages for the misrepresentations.

The defence denied the allegations of the statement of claim, and the defendants counter-claimed (inter alia) for £16,704 1*s.* 9*d.* for money lent and goods sold by the defendants to the plaintiff and Walter Townend as partners.

(1) 34 Ch. D. 582.

The evidence given at the trial before Bacon V.C. is summarized in the report of the decision below (1), and set out in the judgments of Lord Halsbury L.C. and Lords Watson and Herschell in this House.

1888. March 16, 19, 20, 22, 23, 26. *J. B. Balfour* Q.C. (of the Scotch Bar) and *R. B. Haldane* for the appellants:—

The misrepresentations relied on by the respondent Newbigging having been (as is admitted) made innocently, no action could lie for deceit, and no damages could be recovered. Nevertheless the Courts below have given damages, though under another name. Nor is there any question of refunding, for the appellants never got anything out of the business: on the contrary they have lost money they advanced to the firm. The Courts below were wrong in holding that the appellants were either partners in Townend & Co. or concealed principals. The true result of the correspondence and other evidence is that they were nothing more than creditors who advanced money and goods for the carrying on of the business. The fact that they received a share of profits did not make them partners. The House of Lords in *Cox* v. *Hickman* (2) "decided that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents:" 1 Lindley on Partnership (ed. 1878), p. 38; *Ex parte Tennant* (3). The facts here do not resemble those in *Pooley* v *Driver* (4) or *Ex parte Delhasse* (5). A mere power of nominating a partner does not constitute the nominator a partner; *Ex parte Davis* (6) per Lord Westbury. Nor does the fact of exercising control over the business: *Mollwo, March & Co.* v. *Court of Wards* (7). Here the control exercised by the appellants was purely negative. The decree in the present case follows that made in *Rawlins* v. *Wickham* (8), but that decision is not in point. There the defendants were partners and parties to the trading. In the present case they were not.

(1) 34 Ch. D. 582.
(2) 8 H. L. C. 268.
(3) 6 Ch. D. 303.
(4) 5 Ch. D. 458.
(5) 7 Ch. D. 511.
(6) 4 D. J. & S. 523, 531.
(7) Law Rep. 4 P. C. 419.
(8) 3 D. & J. 304.

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The present is not a case for rescission of the contract. Rescission is only applicable where restitutio in integrum can be made, i.e. "where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into:" *Western Bank of Scotland* v. *Addie* (1), per Lord Cranworth; and *Erlanger* v. *New Sombrero Phosphate Company* (2), per Lord Blackburn. In some cases equity can by its machinery in taking accounts substantially restore in integrum, though there has been some change in the subject-matter; but if the subject-matter perishes restitution is impossible, and the defendant is not liable even where the subject-matter perishes from its own inherent weakness, unless the perishing is brought about by some act of his, or from some cause as to which he has made a misrepresentation. Here the business perished, not from its own inherent weakness, but owing to Townend's frauds. The goodwill of the business is gone: there is nothing to restore. Moreover, damages cannot be given in an action for rescission where the misrepresentations are innocently made: *Redgrave* v. *Hurd* (3). Here, the decree though in name for an indemnity is really for damages. The judgment of Cotton L.J. (4) is based on a wrong principle. That of Bowen L.J. (4) is in certain passages more correct but too narrow to fit the facts here. In order to make the appellants liable for an indemnity against the obligations of the firm, the obligations must have been such as originally rested on the appellants and were by contract shifted from them to the firm. If rescission were granted Newbigging would at all events not be entitled to more than a set-off of the capital he brought in against the appellants' counter-claim for money advanced and goods sold.

The House took time for consideration without hearing

Sir *Horace Davey* Q.C. *J. G. Wood* and *George P. C. Lawrence*, for the respondent Newbigging. The respondent Townend was not represented.

(1) Law Rep. 1 H. L., Sc. 145, 164; 5 Court Sess. Cas. 3rd series, H. L. Cas. 80, 89.
(2) 3 App. Cas. 1218, 1277.
(3) 20 Ch. D. 1.
(4) 34 Ch. D. 587.

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My Lords, I think the most convenient course will be to consider what facts are established in this case before applying any rules of law to determine the rights of the parties.

It is clear that in April 1881, the Messrs. Adam were minded to establish for their own benefit a business out of their own immediate line as wool brokers and wool merchants at Leith. They appear to have been creditors of a firm, Hodgson & Co., and appear to have thought it to be for their advantage to purchase some of the plant and machinery, which the failure of Hodgson & Co. had brought into the market for sale. I think it is clear that, in the first instance at all events, Messrs. Adam intended that the business to be carried on at either Bradford or Sowerby should be their own business; but, inasmuch as they were wool brokers and wool merchants, it is probable they would not like to be known to be competing as manufacturers with their own customers, of whom they had many, both in Sowerby and Bradford. They appear, therefore, to have determined that the business should be carried on in some one else's name, and accordingly appear to have opened negotiations with Mr. W. Townend. The purchase of the plant and machinery appears to have been effected through a Mr. David Barker, who is described as a leading machinery dealer and valuer in Bradford. The value and efficiency of the machinery in question are so important in the determination of the question which your Lordships have to decide that it is worth while to consider at this early period of the narrative what was Mr. Barker's opinion, as reported to Messrs. Adam & Son by their solicitors, Messrs. Rawson, Guy & Wade. In their letter of the 14th of April 1881, they describe the spinning plant, both at Salterlee and Square Road, as being of an antiquated description, the frames being short and having a pitch of only $3\frac{1}{4}$ inches. The combing machinery was said to be really good, but Mr. Barker did not recommend his clients to take it. The machinery at Square Road, he said, he would not advise them to touch on any terms, as he had great doubts whether it could by any possibility be made to pay. Notwithstanding, however, this somewhat unfavourable report, the whole of the plant in question was bought by the Messrs. Adam on the

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20th of May 1881, the sale price being £1068 8*s.* 4½*d.* This, together with commission, payment for services rendered, inventory and valuation, brought up the cost price to Messrs. Adam to £1127 8*s.* 4½*d.* On the 30th of May an interview took place between Mr. Townend and Mr. Alfred Adam, and on the 31st Mr. W. Townend writes the letter of that date. "Lightcliffe, 31st May 1881. Dear Sir,—Since our interview of yesterday I have had time to consider over our conversation, and naturally that portion of it relative to my own interests. If you decide on giving the works at Salterlee a year's trial—and I think you may venture to do this without great risk—I am willing to undertake the responsibility of it entirely, to systemise and organise the machinery, the hands, the books and the castings. To do the marketing, both buying and selling, and such financial arrangements as you would think best. My practical knowledge of the trade, experience in management, and facilities of introduction, and acquaintance with business men, give me opportunities not always combined in one man, and which should have their value. As you make a venture in the undertaking, so should I in undertaking the management, as you may decide to close it in a year, and my position then would be worse than it is now. Still, if you can suggest any other terms depending on success, I am willing to arrange. It will be uphill work and require all possible energy and patience. If it were possible to come to some decision by Tuesday next or before I should be glad to know of it, as I must then put off my projected journey.—Yours truly, W. Townend.—Alfred Adam Esq." I think it is impossible to doubt, from the terms of this letter, that Townend was to be simply a salaried manager, that the business was to belong to the Messrs. Adam, that the firm Townend & Co. was to be a mere name, and that Messrs. Adam themselves were the real principals, Townend being simply their servant, and bound to obey their directions.

In the letter of the 22nd of June, Alfred Adam writes to Townend the terms on which he might take a mill, and tells him that if he has the written offers of one or more places, "we," he writes, "would be happy to see you north for final arrangements."

On the 6th of July Mr. Townend writes "that he would

recommend taking room and power for a couple of years," in the event of two mills he mentions not being available. He adds a significant paragraph: "You will see the necessity of making a definite start, first, the transfer of the machinery to Walter Townend & Co., and then giving me the needful to open a small banking account for current expenses. I have given up all my agencies and consider myself entirely at the service of the new firm."

My Lords, it is difficult to keep separate the history of the acquisition of the machinery and the hiring of Mr. Townend, for, in truth, Mr. Townend was the salaried manager for making the venture which Messrs. Adam designed to make with the plant and machinery which they purchased. What they purchased, and for how much, we have seen. What was its condition we may judge from Townend's letter of the 8th of September.

My Lords, if the transaction had been a real transaction of purchase and sale between Townend and Adam, in which Townend was considering what he had given, or agreed to give, for the machinery in question, the tone of the correspondence would have been a very different one from that which the letter in question discloses. To the cost of the machinery thus purchased, a sum of £2000 is added, for which no account has ever been given, and with a manager at £400 a year, and a business thus started, the Messrs. Adam carry it on. They have a balance sheet prepared in which it is assumed that the machinery is of the value represented in it, which is obviously, and even ridiculously, in excess of its real value.

The efficiency of the machinery to compete with other firms is clearly proved not to have been what it was represented, and thus if the true facts were known, Messrs. Adam were carrying on a losing business in which their names did not appear, and which it would certainly be very greatly to their advantage to get rid of, and which, if it were to be made to succeed, it must be by the addition of capital which the Messrs. Adam were not minded themselves to advance.

My Lords, it is not necessary in this case to impute fraud to the appellants; the relief sought was not based upon the ground of fraud; but I cannot yield to one argument which was suggested,

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that I am not to find misrepresentation proved, which is all the respondent need prove, because the facts may prove more, and shew that the appellants must have known the facts to be as they really were, and yet misrepresented them. The respondent is content to shew what the facts were, and that relying on the representations made to him, he entered into a contract from which he seeks to be relieved. Now, this being the condition of facts as I find them to be, the state of things being what I described, on the 2nd of November 1882, Mr. A. C. Newbigging encloses to his brother, the respondent, a report which he had received from the appellants, and though something was said by Mr. Balfour as to the omission of the words "or his nominee" from the copy of the report sent to the respondent, the substantial statements upon which the question turns are admitted to have come from Mr. Adam.

My Lords, I am very glad that upon this written document I am able to compare the statements made in it with the facts as they have now been proved, and to be able without any reference to the contradiction of what was alleged to have taken place by word of mouth to arrive at a conclusion sufficient to decide this case. Comparing the statement made in the prospectus or report handed to Mr. Newbigging, the brother, with the facts as they are now clearly established, I have no doubt that there were in the document most material misrepresentations. From the narrative I have sketched, it is manifest that the state of the machinery in fact was very different from that which it was represented to be in respect of its efficiency and its cost. The balance sheets (two important elements in which the machinery and the stock were most inaccurately stated), represented a gradually improving business, and there can now be no doubt the business was insolvent and gradually approaching a collapse, a collapse which on the 1st of November 1884, it reached by the firm, Townend & Co., stopping payment. Under these circumstances there can be no doubt of the right to relief; the extent and nature of the relief might be the subject of debate, but for the admissions made during the argument before your Lordships.

My Lords, I am content, after these admissions, to decide this

case simply upon the ground of the misrepresentation proved, and to relieve Mr. Newbigging from the contract which he was thus induced to enter into, and upon the very ground set forth by Mr. Adam himself. When insisting on the concluded bargain he says: "We furnished you with data sufficient in our, your, and Mr. Anderson's opinion to enable us all to judge whether the business was good or not, and Mr. H. must know well enough that if we have given untrue statements your brother would of course have ground for reducing what you and we have been about."

But I wish to guard myself against being supposed to throw any doubt upon the principles upon which a partnership can be established.

If a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit or loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership; and I think I should add, as applicable to this case, that the separation of different stipulations of one arrangement into different deeds will not alter the real arrangement, whatever in fact that arrangement is proved to be.

And no "phrasing of it" by dexterous draftsmen, to quote one of the letters, will avail to avert the legal consequences of the contract. What Mr. Adam himself thought about it, and what the object was, is sufficiently established by his letter of the 2nd of February 1883 to Mr. Drummond. In that letter he puts the scheme thus:—"A. is now arranging this on the following basis:—A deed of copartnery is being prepared between B. and C. (A.'s nominee), B. taking one-third and C. two-thirds, while C. and A. have a private arrangement by which C. divides his nett profits and losses with A., in so far as the latter are incurred in the regular way of the firm's business; but A. is not to be responsible for losses on transactions that have been concealed from him or entered into against his expressed opinion. It is contemplated that by this arrangement B. and C. will constitute the firm, and be solely responsible for its indebtedness to the public, while A. will still be out of it—so far as the public

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is concerned—and only liable to C., as an individual, for what is mentioned in the previous sentence. If there is a better method for carrying out the foregoing intentions you may be able to advise me.—Yours truly, Alex. Adam."

It is obvious to ask what is the meaning of the phrase "so far as the public is concerned," and to ask what were the "intentions."

My Lords, I do not believe that in any of the numerous cases which have been discussed in late years upon this subject there has been any real difference of view upon the principles upon which the question of partnership or no partnership is to be decided.

Doubtless in *Cox* v. *Hickman* (1) in this House it was pointed out that participation in profits is not necessarily and conclusively a test of partnership, but no one has ever doubted that if the adventure is carried on for a person so that it is his business, then he is a partner, whatever subtle contrivance he may resort to to cloak and muffle the real nature of his interest in the concern. If the problem to be solved is whose the business really is, it is obvious that many questions of fact may be material in arriving at a sound conclusion, such as the money supplied, the control of the business, the profits received, and the character in which they are received.

My Lords, I have thought it right to say so much upon the subject, because though content to decide this case without reference to the question of partnership, I am anxious that we should not be supposed to hold that these contracts did not constitute a partnership. The draftsman apparently looked at all the cases, beginning at *Waugh* v. *Carver* (2), and ran through them all, including *Pooley* v. *Driver* (3), *Mollwo, March & Co.* v. *Court of Wards* (4), *Ex parte Delhasse* (5), and *Ex parte Tennant* (6), and cleverly strives to avoid the effect of each test discussed in these cases by something which should have the same effect, but which should avoid the specific test. I wish to say every such expedient would be absolutely void in the view I take of the law.

(1) 8 H. L. C. 268.
(2) 2 H. Bl. 235; 1 Sm. L. C. 9th ed. p. 877.
(3) 5 Ch. D. 458.
(4) Law Rep. 4 P. C. 419.
(5) 7 Ch. D. 511.
(6) 6 Ch. D. 303.

My Lords, the only remaining question is one which as applicable to this case I have some difficulty in understanding. If the facts are as I have found them to be, what is the difficulty of restoring Messrs. Adam to their former position, a profitless and sinking business? If there were any value in it, any goodwill attached to it, and if it exists or ever existed, they can have it still. It surely cannot be argued because Colonel Newbigging was under the delusion, and continued under the delusion, that he had entered into a bonâ fide concern, solvent and profitable, that he is to be without remedy because he finds out that he was deluded, and continued deluded down to the breaking up of the concern. Now, what is the thing to which Messrs. Adam want to be restored? I profess myself unable to say. As I have said, I am content to modify the order of Bacon V.C., because the extent of the relief involved in that order is not now asked for or required to do justice between these parties. The modification I shall propose to your Lordships is in these terms:—that the order of the Vice-Chancellor ought to be varied by limiting the indemnity to the bills included in the balance of £16,704 1*s.* 9*d.*, which is the subject of the appellants' counter-claim; and by striking out the decree for £324 2*s.* 7*d.* and substituting a declaration that the said sum be repaid to the respondent out of the firm assets which have been realized and paid into Court. With that modification I move your Lordships that the orders appealed from be affirmed, and this appeal dismissed with costs.

LORD WATSON:—

My Lords, in the year 1881 a firm known as Walter Townend & Co. commenced business as worsted-spinners at Providence Mills, Bradford. Walter Townend, who is said by the appellants to have had one-half share of the business, was the sole ostensible partner. He appears to have been a man of great practical skill and experience, but he was destitute of means. Accordingly the machinery required for manufacturing yarns was purchased and paid for by the appellants, who are wool-brokers in Leith, having also a branch office in Bradford. They arranged, through Walter Townend, for a lease of the Providence Mills; they

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advanced cash to start the concern, and the capital requisite for carrying it on was provided by discounting bills drawn by them upon and accepted by Townend & Co. By a letter dated the 9th of July 1881 Walter Townend agreed, at any time during the currency of these bills, to assume as a partner any person whom they might appoint, giving him an interest in the firm to the extent of one-half; but from that date, until the respondent entered the firm in February 1883, they appear to have taken an active supervision and control of Walter Townend's conduct of the business.

Towards the end of October 1882 negotiations were entered into between the appellants and the respondent, which terminated in February 1883 in an arrangement by which the respondent became, from and after the 1st of that month, a partner to the extent of two-third shares in the firm of Walter Townend & Co., the remaining third being held by Walter Townend. The basis of these negotiations was a written statement furnished by the appellants, in which it was, inter alia, set forth that the business was formed by the appellants; that the practical partner was to have a half interest in the concern, and the other half was for themselves, who supplied all the funds, or their nominee; that the machinery was of the value of £6000, and was an efficient plant, capable of turning out varied yarns; that the balance-sheet of the 31st of January 1882 shewed an apparent loss of about £150, which was highly satisfactory; that a balance struck at 31st of July 1882 shewed a net profit to divide of £800; and that the divisible profits from that date till the 31st of January 1883 were estimated at £1500. It is not matter of dispute that the respondent entered into the transaction in reliance upon the substantial accuracy of these statements. Before the arrangement was finally concluded and reduced to writing, the respondent was strongly advised by his law agent, the late Charles Henderson S.S.C., to get some independent practical man, acquainted with the business of wool-spinning, to examine into the whole matter, and give his opinion and advice; but that suggestion was as strongly opposed by the appellants. The appellant, Alexander Adam, wrote to the respondent's brother, who was then conducting the negotiations on his behalf, that the

appellants had already furnished data sufficient "to enable us all to judge whether the business was good or not; and Mr. H. (i.e., Mr. Henderson) must know well enough that if we have given untrue statements, your brother would, of course, have ground for reducing what you and we have been about."

The respondent, at the time when he became a partner of Walter Townend & Co., was inexperienced in commercial business, having left the army, after attaining the rank of major, in 1882. In August 1884 he began to entertain the suspicion that all was not right with the business. On investigation it was found to be in a state of insolvency; and in November 1884 he brought this suit against the appellants for rescission of the arrangement of February 1883, and for restitution, on the ground that he was induced to become a partner by the misrepresentations of the appellants, against whom he makes no charge of intentional deceit.

That the information furnished by the appellants, with regard to the state of the business, was materially inaccurate, is conclusively established by the evidence, and was but feebly disputed at the bar. It was discovered in 1884 that Mr. Townend had been in the habit of "salting" the stock lists, or, in other words, of putting down larger quantities of goods, both manufactured and unmanufactured, than were actually in the possession of the firm. In consequence of that ingenious operation, the balance-sheet of 31 July 1882 shewed a profit of £843 instead of a loss of more than £2000; and the balance-sheet of 31 January 1883 brought out a profit of £1300 odd (which had been estimated by the appellants at £1500) instead of a loss, during the half-year's trading, of £1700. In short, the business, which was represented by the appellants to be yielding satisfactory and gradually increasing profits, amounting in all to upwards of £2500, had in reality been losing money at every balance; and on the 1st of February 1883, when the respondent became a partner, its liabilities exceeded its assets by no less than £3700. The respondent, in the course of his investigations into the affairs of the firm, also discovered, in September 1884, that the machinery, which was represented by the appellants to be thoroughly efficient, and of the value of £6000, had been bought second-hand for £1100, and

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had thereafter been from time to time repaired and renovated. Shortly after its purchase, whilst it was being placed in Providence Mills, it was thus described by their practical partner in a letter to the appellants: "Nearly every frame has been or is still to renovate and repair, for they were one and all in a most disgraceful state of dirt and breakage and neglected repair. However, we are going through each machine, and those that are worth the expense we shall put in thorough-going order, robbing a few of the worst to make up the others." In the balance-sheet of the 31st of July 1882 the machinery was entered at £6072. That sum represents its original cost, with a speculative, if not imaginary £2000 added by the appellants themselves, the balance being composed of every item expended in cleaning, repairing or renewing the plant, whilst no deduction was made on account of tear and wear. I hardly think an intending partner, if he had been informed of the history of the plant, and the method of valuing it, would have been satisfied to take it over at the sum at which it stood in the books of Townend & Co. Until 1884 the appellants neither knew, nor had reason to suspect, Mr. Townend's practice of salting the stock lists; but they did know all about the acquisition of the machinery and its valuation; and their representations with regard to it were somewhat deficient in candour.

I entertain no doubt that these misrepresentations, although not fraudulently made, are sufficient to entitle the respondent to rescind the arrangement of February 1883, if he is in a position to give as well as to demand restitution. He relied, and was entitled to rely, upon the assurances which he had received, as to the satisfactory condition of the business, until he became aware of the true state of the facts. It cannot be reasonably suggested that he ought to have known these facts before his suspicions were awakened in August 1884; and he then made a searching investigation of the affairs of the partnership, which resulted in his bringing this suit against the appellants in November 1884.

The appellants make several answers to the respondent's claim for restitution. First of all, they say that they received nothing, and have therefore nothing to restore, inasmuch as they had no

interest in the firm of Walter Townend & Co. or in its assets, beyond the bare power to nominate a partner during the currency of the bills which they drew upon the firm, and which were discounted in order to supply its capital. According to their argument Walter Townend was the only socius; and the half share which was not held by him was represented as having been "in suspense" during the two years which elapsed before the respondent became a partner; but learned counsel did not attempt to explain what was meant by that expression. It is impossible to assent to the argument, because the plain inference to be derived from the correspondence and facts in evidence, is that the appellants were either principals, Townend being merely their agent, or that they were his co-partners in the business. Both Courts below came, without difficulty, to that conclusion, which is borne out by the representations of the appellants; and it is immaterial, for the purposes of this case, in which of these relations the appellants stood to the original firm of Walter Townend & Co.

The next argument advanced by the appellants was a very extraordinary one. The agreement of February 1883, between the respondent and Walter Townend, contains a provision, usual in such cases, that the machinery, plant, and stock-in-trade should be valued as at the 1st of February 1883 (the day of the respondent's entry), and that the inventory and valuation should be signed by the parties, and the amount thereof carried to the credit of the old firm. If not broadly stated it was at least suggested by some of the appellants' witnesses that the provision was purposely introduced by Mr. Henderson, the respondent's law agent, in order to supersede the necessity for an investigation and report by an independent valuator, which he had advised his client to obtain before entering into the arrangement; and on the strength of that evidence, the appellants maintained that they were freed from all responsibility for their misrepresentations by the fact that the agreed on valuation was made, although without the aid of any one outside the firm. It is sufficient to say that the oral testimony bearing upon this matter, upon which the appellants rely, does not appear to me to be deserving of credit. The Vice-Chancellor, who saw the witnesses examined, said:

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"Having regard to the other evidence, and to the facts proved on both sides, I am compelled to say that wherever any material difference of statement occurs, the weight of evidence is in favour of the plaintiff's witnesses." In that observation I concur.

The appellants, lastly, maintained that, at the time when this suit was instituted, it was impossible for the respondent to restore the same interest which they had given him in the business of Walter Townend & Co. Admittedly the concern was then, as it had been all along, insolvent; it had never earned profits, and its losses had increased. Legal proceedings were taken by some of its creditors, during the dependence of this litigation, in the course of which assets were realized, and together with a sum of £324, advanced by the respondent, were applied in payment of the whole debts of the firm, with the exception of a balance owing by bill and otherwise to the appellants. It was argued that, in these circumstances, restitution was no longer possible, because the respondent's two-third shares of the business had practically ceased to represent an interest in a going concern such as they gave to him; and, in support of that proposition they referred to *Western Bank of Scotland* v. *Addie* (1) and similar authorities. In a question of rescission of his contract by a partner, whether in respect of fraud or of misrepresentation, there is no analogy, after insolvency, between the case of an ordinary partnership and that of an incorporated company. The difference between the two cases was clearly explained in *Tennent* v. *City of Glasgow Bank* (2), where a shareholder brought an action to have his connection with the bank dissolved, and his name removed from the register, on the ground of fraudulent misrepresentation by the directors, the very day before a winding-up resolution was passed. The Lord Chancellor (Earl Cairns) pointed out that the member of an ordinary partnership may have his relief, in that shape, against his co-partners, notwithstanding its insolvency, because his liability to creditors is not thereby affected. But dealing with the case before him, which was that of a company registered under the Act of 1862, the noble Earl said: "The repudiation of shares, which, while the company was solvent, would not or need not have inflicted any injury upon creditors, must now of necessity inflict a very serious

(1) Law Rep. 1 H. L., Sc. 145. (2) 4 App. Cas. 615.

injury on creditors." Lord Cranworth, in *Western Bank of Scotland* v. *Addie* (1), approving so far of the judgment of the Court of Session, held the circumstance that the shares, from mismanagement or otherwise, had become depreciated in value, after the date of his purchase, to be no obstacle to the shareholder's repudiation of his contract. In the present case the interests of creditors are not involved; the respondent could not, by rescinding the arrangement of February 1883 in a question with the appellants, escape from the liabilities to third parties which he incurred by becoming and continuing to be de facto a partner of Townend & Co.; and there was no change, either in the character of the business, or in the mode of conducting it, between February 1883 and November 1884. During that period the business had grown worse, because the deficit which existed, but had not been discovered at its commencement, had largely increased at its close, an increase of liability which was not owing to any fault of the respondent's, and which might probably have been anticipated if the actual state of its affairs had been known in the beginning of the year 1883. Such deterioration, for it is nothing more, cannot stand in the way of the respondent's claim for mutual restitution.

The Vice-Chancellor, whose order was affirmed simpliciter by the Court of Appeal, has set aside the arrangement of February 1883, dissolved the respondent's connection with the firm of Walter Townend & Co., and ordained the appellants to repay to him £9700, the amount of capital which he contributed, under deduction of £1700, drawn by him from the business. His Lordship likewise ordained the appellants to repay £324 2*s.* 7*d.* which was advanced by the respondent after the commencement of this suit, towards the discharge of the firm's debts; but that sum is no longer in controversy, because partnership assets have been recovered and paid into Court which are sufficient to meet the claim. The order of the Vice-Chancellor further declares that the appellants are bound to indemnify the respondent against all outstanding debts, claims, demands, and liabilities which he has become, or may become, liable to pay for or on account of the transactions of the partnership.

(1) Law Rep. 1 H. L., Sc. 166.

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A very able legal argument was addressed to your Lordships, by the appellants' counsel, against the competency of giving that general indemnity. It was said to be equivalent to giving a plaintiff, who merely seeks rescission and restitution on the ground of innocent misrepresentation, the same measure of relief to which he would be entitled in an action of damages based on fraud. The question thus raised appears to me to be one of great nicety and difficulty; and it was evidently so regarded by the Court of Appeal. None of the authorities referred to in the course of the argument go quite so far. In *Rawlings* v. *Wickham* (1) the defendants, who were held liable to indemnify the plaintiff against all the outstanding debts and engagements of a banking firm, themselves remained partners along with him, which is not clearly shewn to have been the case here. I refrain from expressing any opinion on the point, because it has become unnecessary to decide it, and the respondent's counsel were not heard in reply. It was admitted, on both sides of the bar, that the other debts of the firm have been paid out of the partnership funds, and that the general indemnity can only apply to a debt of £16,704 1*s.* 9*d.*, due to the appellants from Walter Townend & Co., which is the subject of a counter-claim by them in this suit. That claim stands in a very different position from debts and liabilities incurred by the firm to third parties whilst the respondent was a member of it. The arrangement under which he became a partner being void, in any question between him and the appellants, they are estopped from saying that he is a member of the firm, which is their proper debtor; and the consequence is that their claim, quantum valeat, must be preferred against the firm, and not against him.

I am accordingly of opinion that the orders appealed from ought to be affirmed with costs, subject to the variations which have been proposed by the Lord Chancellor.

LORD FITZGERALD :—

My Lords, at the close of the very learned and elaborate argument at the Bar in this case I had for myself arrived at a conclusion as to the proper order to be made, and had noted my

(1) 1 Giff. 355; 3 D. & J. 355.

own reasons for arriving at that conclusion; but I have since read the judgments of my noble and learned friend opposite (Lord Watson) and of the noble and learned Lord on the woolsack. My reasons have now been completely anticipated, and expressed in much better language than I could have used, and therefore I shall not take up time by expressing those reasons. I shall only say that I concur with the order which is proposed to be made.

LORD HERSCHELL:—

My Lords, in this case the appellants complain of a judgment of the Court of Appeal, affirming a judgment of Vice-Chancellor Bacon.

The action was brought by the respondent to set aside certain agreements of the 21st of February 1883 on the ground that he was induced to enter into them by the misrepresentations of the appellants, and for consequential relief. It becomes necessary, therefore, to inquire into the position of the parties at the time these agreements were executed, and into the circumstances which preceded their execution. Major Newbigging, the respondent, who was serving with his regiment in India, was desirous of leaving the army and devoting himself to commercial pursuits. His brother, A. C. Newbigging, was in business in Leith, and was a neighbour of and acquainted with the appellants, who were wool merchants there. They thus became aware of the respondent's desire. In the autumn of 1882, A. C. Newbigging, on behalf of his brother, commenced negotiations with the appellants, with a view to his becoming a partner in a business in which they were interested. In the course of the negotiations a document, which has been styled a "prospectus," was handed by one of the appellants to A. C. Newbigging. This document stated amongst other things that the spinning business of B. & Co. (i.e., Walter Townend & Co.) had been formed about fifteen months before by Mr. B. (i.e., Walter Townend) and Adam, Sons & Co.; that Mr. B., the practical partner, was to have a half interest in the concern, and the other half was for the firm of A. S. & Co., who supplied all the funds, or its nominee; that B. & Co. had put in its own machinery, which was then a thoroughly efficient plant;

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that the balance struck on the 31st of January 1882 shewed an apparent loss of about £150, whilst on the 31st of July 1882 there was shewn a net profit to divide of £800; and that Mr. B. estimated that the net profit shewn by the balance of the 31st of January 1883 would be £1500.

There is considerable controversy as to what passed between the parties by word of mouth during the negotiations, but I am content to rest my judgment upon the representations made by this and other documents, about which there can be no doubt, and which were intended to be and were relied on. In addition to the prospectus, balance-sheets were exhibited to A. C. Newbigging which represented the profit in the half year ending the 31st of July 1882 as £843 19*s.* 9*d.*, and in the half year ending the 31st of January 1883 as £1356 5*s.* 9*d.* In the latter balance-sheet the machinery was valued at £6921 7*s.* 1*d.* Representations therefore were distinctly made by the appellants that the business was solvent and profitable, that profits exceeding £800 and £1300 had been made in the two previous half years, and that the plant was thoroughly efficient. Upon these representations the respondent consented to become a partner in the firm of Walter Townend & Co. and to bring in a capital of £10,000. Whilst the deeds necessary for carrying out the agreement were in preparation, Mr. Henderson, a solicitor in Edinburgh who was being consulted by A. C. Newbigging, on the 30th of January wrote to Mr. Adam stating that he had advised A. C. Newbigging, as he had himself no knowledge of the business, to put it generally before a practical man for confidential report. To this Mr. Adam strongly objected, writing of the matter in hand as one "where the main foundation is that of mutual confidence," and adding, "We furnished you with data sufficient in our, your, and Mr. Anderson's opinion to enable us all to judge whether the business was good or not, and Mr. H. must know well enough that if we have given untrue statements your brother would of course have ground for reducing what you and we have been about." Ultimately A. C. Newbigging did not insist upon putting the matter before a practical man, and the deeds were executed. Before stating their general effect I may at once deal with the contention of the appellants, that it was agreed to substitute a valuation of the

machinery made after the execution of the agreement for that independent valuation which Mr. Henderson recommended. This is founded upon the fact that in the agreement between Newbigging and Townend of the 21st of February 1883 it is provided that the machinery, plant, and stock-in-trade should be valued as at the 1st of February, and the amount of the valuation placed to the credit of the late firm. This clause is an ordinary one, found in many such partnership agreements, its purpose being to determine the date as at which the machinery, stock-in-trade, &c., should be valued and taken over at its then value by the new firm. The suggestion that it was to be a substitute for an independent examination made beforehand to satisfy the Newbiggings as to the expediency of the partnership arrangement, and that because the respondent did not afterwards insist on an independent valuation of the machinery, but was content to accept the representation of its value put forward by the Adams, he is now precluded from objecting that its condition and value were misrepresented, appears to me without foundation, I had almost said preposterous. Indeed, I am surprised that the Messrs. Adam, who regarded the transaction as one depending on mutual confidence, and who suggested that if they had made untrue statements Major Newbigging would have ground for reducing what was agreed on, should now be found arguing that even if that gentleman was deceived he is precluded by the confidence in them which he displayed from obtaining reduction.

The agreements executed on the 21st of February are three in number. One between Townend and the respondent provided for a partnership for thirteen years from the 1st of February 1883, determinable as therein mentioned, that Townend should receive one-third of the profits, and the respondent two-thirds, and that the capital, which was to be £10,000, should all be brought in by him. Another was between the appellants and respondent, by which it was agreed that the respondent should pay to the appellants a sum equal to one-half of the net profits received by him, and which stipulated that if any loss should arise on transactions in which the appellants had not been consulted, or against which they had advised, the same should not be reckoned to diminish the sums payable to them under the agreement. The third

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agreement, which was between Townend and the appellants, related to the respondent's share in case of a dissolution of partnership, by notice or death, and is not material.

Before I deal with the events which happened after the firm was thus constituted, I must revert to the history of the business prior to February 1883, to see whether the representations made by the appellants are in accordance with fact.

It appears that in May 1881 the machinery in certain mills near Halifax, belonging to a Mr. Hodgson, who was indebted to the appellants' firm, was put up for sale by auction, and purchased on their behalf for the sum of £1080 8*s.* 4*d.*: the commission for buying, and the costs of an inventory and a valuation brought this sum up to £1127 8*s.* 4*d.* The appellants shortly afterwards entered into an arrangement with Walter Townend, by which a spinning business was to be started under the firm of Walter Townend & Co., and the machinery, obtained under the circumstances I have mentioned, was to be purchased or taken by that firm at the price of £3127 8*s.* 5*d.* This, it will be seen, was £2000 in excess of its cost, even with the expenses I have just referred to added. I shall have something to say presently as to the nature of the arrangement between the Adams and Townend, but I may at once observe that I can see no justification for such an addition, especially when I consider the description given of the condition of the machinery at the time of, and shortly after the purchase. It is said that some of it was exchanged for better machinery before February 1883, but I cannot imagine that what was received in exchange was worth more than what was given. No deduction was ever made from the £3127 8*s.* 5*d.* in the machinery and plant account, and if any sum was paid on an exchange or even for repairs it was added to the £3127 8*s.* 5*d.*, and went to make up the £6921 7*s.* 1*d.* at which the machinery stood in the balance-sheet of January 1883. It appears to me, too, to be abundantly proved that the machinery was not in a thoroughly efficient condition. The utmost that the only witness called on this point by the appellants could say was that its condition was "fairly efficient"—a very different thing, to my mind, and I believe that this was even too favourable a description of the machinery. I have no

hesitation in holding that there was a serious misrepresentation of the condition of the machinery, and of its value also. The latter point is perhaps of as great importance as the former. For if the machinery had been taken in the balance-sheet at its true value (even allowing that this was somewhat in excess of the sum paid for it) instead of a profit of £2200 having been shewn as the earnings of the year ending January 1883, a very small profit only would have appeared.

But this was not the extent of the misrepresentation as to the condition of the business. I see no reason for not accepting the evidence of Mr. Musgrave with respect to the over-valuation of the stock, and if he be correct the balance-sheet of July 1882 ought, on this account alone, instead of a profit of £843, to have shewn a loss of £2096, and that of January 1883 a further loss of nearly £1700, making the extent of the loss in the year preceding the agreement £3719. The business, therefore, instead of having been a profitable one in the year before the respondent joined it, had been carried on at a heavy loss, and it is, I think, proved that it was then insolvent to the extent of upwards of £5000.

I have said enough to shew that the conclusion cannot be resisted that the respondent was induced to enter into the agreement to become a partner by the misrepresentation of the appellants, and that he is entitled as against them to a rescission, unless there be some bar to his now obtaining it.

Exception, however, is taken by the appellants to the order appealed from on several grounds. First, it is said that the Court was not justified in ordering the appellants to pay to the respondent the sum of £9276 6*s.* 1*d.* brought by him into the business. They contend that the only agreement to which they were parties was that between the respondent and themselves, and that the payment was not made under this agreement, but under the one between the respondent and Townend, to which they were no parties. Their case is that the undertaking in which the respondent was to become a partner belonged to Townend alone, their only interest being that of large creditors with the right to nominate a partner. I cannot adopt this view. I think it clear that the manufacturing business carried on under

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the firm of W. Townend & Co. either belonged to them, or that they were interested in it as partners, it matters not which, and that the three instruments of February 1883 were only the machinery for carrying into effect an agreement made between the respondent and the appellants, by which he was to acquire a share in this business. Upon this view of the facts I agree with the Court below in thinking that it follows that upon rescission the respondent is entitled to a repayment of his capital.

The appellants further object that the respondent is precluded from now obtaining rescission because restitutio in integrum has become impossible. He cannot, they say, restore them to their former position, because at the time he brought his action and claimed rescission the business, an interest in which he agreed with them to purchase, was hopelessly insolvent and no longer a going concern. They further allege that this condition of things did not result from its inherent weakness at the time of their agreement with the respondent, but from the mode in which it was carried on by Townend. They suggest, indeed, that Townend somehow or other misappropriated the stock-in-trade, or the money which ought to have gone in payment for it. All this, however, is mere surmise. There is absolutely no proof of it beyond the fact that the stock held at the date of the several balances was overstated, and that in November 1884 the concern was insolvent to the extent of some £16,000. It is certain that the condition of the concern at that date did not result from any act of the respondent personally. Its affairs appear to have been carried on after he was a partner in precisely the same way as before. I have already pointed out that the enterprise was insolvent to a large amount when the respondent was induced to take a share in it; and I do not think the fact that the extent of its insolvency afterwards increased justifies the contention that restitutio in integrum is impossible. To hold otherwise would be to say that where a losing and insolvent business is sold by means of the representation that it is solvent and profitable, rescission could never be obtained if the loss were increased prior to the discovery of the true state of affairs. I am, of course, putting aside any question of laches, for there is no pretence in the present case for saying that the discovery would

have been made earlier had there been due diligence on the part of the respondent.

The next exception taken on behalf of the appellants is to that part of the order which dismissed with costs their counter-claim as against the respondent. This counter-claim alleged that the respondent and W. Townend, as partners in the firm of W. Townend & Co., were indebted to the appellants in the sum of £16,704 1*s.* 9*d.* for money lent and goods sold by the appellants to the said partnership. The appellants insist that even if the agreement of February 1883 be rescinded, they are entitled to recover this sum as a debt against the respondent, and that to deny them this right is in effect to award damages against them, which cannot be done in an action of this description. I am unable to accede to this view. The liability of the respondent arises, if at all, from the circumstance that he is a partner in W. Townend & Co. But the hypothesis with which we are dealing is that the respondent was not a partner, and that his agreement to become so must be treated, as against the appellants, as though it had never existed. They are, in my opinion, not entitled to claim any benefit of a contract induced by their wrongful act. I think, therefore, that it was rightly held that they could not treat the respondent as liable for the debt due to them from W. Townend & Co.

One point only remains. The order affirmed by the Court of Appeal declared that the appellants were bound to indemnify the respondent against all outstanding debts and liabilities which he had or might become subject to or liable to pay in respect of the dealings and transactions of the partnership. Unless it could be established that the appellants were, in fact, partners in the firm of W. Townend & Co. from and after February 1883, there might, perhaps, be some difficulty in supporting this part of the order. But it is not necessary to pronounce any judgment on the point, inasmuch as it was stated at the bar by the learned counsel for the respondent that there are no such debts or liabilities, and that he was content that the order should be varied by limiting the indemnity to the bills (if any) included in the debt claimed by the appellants which they had parted with to third persons. If they cannot recover their

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debt it is clear that they can have no right to impose a liability upon the respondent by transferring these bills. I am of opinion that the order of the Court below should, with the variation proposed by the Lord Chancellor, be affirmed.

Judgment of Bacon V.C. varied by limiting the indemnity to the bills included in the balance of £16,704 1*s.* 9*d. the subject of the appellants' counter-claim; and by striking out the decree for* £324 2*s.* 7*d. and substituting a declaration that the said sum be repaid to the respondent William Newbigging out of the firm's assets which have been realized and paid into Court. Subject to these variations the judgments of Bacon V.C. and of the Court of Appeal affirmed; and appeal dismissed with costs; cause remitted to the Chancery Division.*

Lords' Journals 11th June 1888.

Solicitors for appellants: *Parker, Garrett & Parker.*

Solicitors for respondent Newbigging: *W. & J. Flower & Nussey,* for *Killick, Hutton & Vint,* Bradford.

[HOUSE OF LORDS.]

H. L. (E.)
1888
March 12.

THE RIGHT HONOURABLE HENRY NORTH, EARL OF SHEFFIELD . . } APPELLANT;

AND

THE LONDON JOINT STOCK BANK, LIMITED, THE CAPITAL AND COUNTIES BANK, LIMITED, THE ROYAL BANK OF SCOTLAND, JOHN YOUNG, AND EDWARD EASTON (EX PARTE AS TO EASTON) . . . . . } RESPONDENTS.

Banker—Pledge—Deposit by Money-Dealer of his Customers' Securities—Estoppel—Foreign Bonds payable to Bearer—Negotiable Securities—Purchaser for Value without Notice—Notice of Infirmity of Title in Pledgor.

S. gave to E. certificates of railway stock with transfers thereof executed by him in blank, and bonds of foreign companies (alleged to be negotiable securities), for the purpose of raising £26,000. E. gave these securities to M. a money-dealer in London to secure £26,000 advanced by M. to E. M. deposited the transfers and securities, together with other securities of his customers, with various banks, as security for large loan accounts running between him and them, the blanks in the transfers of stock being filled up with the names of nominees of the banks. The banks in so dealing either actually knew, or had reason to believe, that the securities did or might belong not to M. but to his customers. M. having become bankrupt, the banks sold some of S.'s securities, and claimed to hold the proceeds and the unsold remainder as security for all the debt due from M. to them:—

Held, reversing the decision of the Court of Appeal (34 Ch. D. 95), that though the banks had the legal title to the securities they were not purchasers for value without notice but ought to have inquired into the extent of M.'s authority, and this whether the securities were negotiable or not; and that upon payment to the banks of the money advanced by M. to E., S. was entitled to the value of such of the securities as had been sold by the banks, and to redeem the remainder.

APPEAL from a decision of the Court of Appeal, reported as *Easton* v. *London Joint Stock Bank* (1). The facts are set out at length in that report and are also discussed in the judgments in this House. For the present purpose the following brief statement of the evidence given at the trial before Pearson J. will suffice.

(1) 34 Ch. D. 95.

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The appellant gave Edward Easton authority to borrow, first £20,000 and afterwards £6000, upon the security of stocks in the Grand Trunk Railway Company of Canada and foreign railway and canal bonds belonging to the appellant. To raise these sums the appellant gave Easton the bonds, and the stock certificates together with transfers of the stocks executed by the appellant, blanks being left for the names of the transferees. These stocks, transfers and bonds were deposited by Easton with Lewin Mozley, a money-dealer in the city of London, who lent Easton first £20,000, and afterwards £6000 upon their security. Some of these stocks, transfers and bonds were deposited by Mozley with the London Joint Stock Bank, some with the Capital and Counties Bank, and some with the Royal Bank of Scotland, together with other securities belonging to Mozley's customers, as security for large loan accounts running between Mozley and the banks. The transfers were filled in with the names of officials or nominees of the banks and registered with the Grand Trunk Company. The Court of Appeal on the authority of *Goodwin* v. *Robarts* (1) held that the bonds were to be treated as negotiable securities between the parties.

Evidence was given of the nature of Mozley's business and of his dealings with the banks, and the banks endeavoured (without success) to prove a custom in the City that money-dealers were at liberty to deposit their customers' securities en bloc as security for their own debts to the banks. Of the effect of this evidence the Court of Appeal and this House took different views. The Lords Justices held that the banks, though they had reason to believe that the securities belonged to Mozley's customers, yet having the legal title to the securities, and believing that Mozley had authority to deal with them as his own, were in the position of purchasers for value without notice. In this House, as will be seen from the judgments, their Lordships, being of opinion that the banks either actually knew, or had reason to believe, that the securities did or might belong not to Mozley but to his customers, held that the banks were bound to inquire into the extent of Mozley's authority to pledge the securities.

Early in May 1883 Mozley went into liquidation. At that

(1) 1 App. Cas. 476.

date the London and Joint Stock Bank held some of the stocks, and some unsaleable bonds; the Capital and Counties Bank held some of the bonds; and the Royal Bank of Scotland held both stocks and bonds. Some of the appellant's securities were sold by the banks to repay themselves.

On the 28th of May 1883 Easton and the appellant applied to the banks and to John Young, the trustee in Mozley's liquidation, offering to redeem the appellant's securities upon payment of the amount due to Mozley in respect of his loans to Easton, but this offer was refused.

Easton and the appellant afterwards brought an action against the banks and Young, claiming first a declaration that they were on the 28th of May 1883 entitled to redeem the stocks and bonds on payment of the sums then due from Easton to Young as Mozley's trustee in liquidation; secondly damages against the banks for selling securities belonging to the appellant; and thirdly redemption of such securities as might remain unsold.

Pearson J. dismissed the action for reasons stated in the report of the decision below (1). The Court of Appeal (Cotton, Bowen and Fry L.JJ.) affirmed that decision for other reasons stated in that report. Against these decisions the Earl of Sheffield alone appealed, Easton being made a respondent, but taking no part in this appeal.

1887. Nov. 25, 28; Dec. 5, 7. *Rigby* Q.C. and *Grosvenor Woods* for the appellant:—

The Court of Appeal held in our favour that the appellant only authorized Easton to pledge his securities for the two sums of £20,000 and £6000, and the question is whether that Court was right in holding that the respondent banks were purchasers for value without notice. The result of the evidence is that the banks knew, or at least had good reason to believe, that the securities were not Mozley's own. Having acted without "due caution" they took the securities at their peril, and cannot retain them, whether negotiable or not, against the true owner: *Haynes* v. *Foster* (2); *Foster* v. *Pearson* (3). The banks were bound to shew

(1) 34 Ch. D. 95, 101.
(2) 2 Cr. & M. 237.
(3) 1 Cr. M. & R. 849.

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that they believed the securities were Mozley's, and were induced by that belief to lend their money: *Cooke* v. *Eshelby* (1). This they entirely failed to shew. Their knowledge of Mozley's business and the whole tenour of his transactions with them put the banks on inquiry as to what his authority really was. The judgments below go the length of saying that any representation of an agent as to his authority binds the principal.

Cookson Q.C. (*Rawlins* with him) for the London Joint Stock Bank, respondents:—

This bank held registered stock and bonds payable to bearer and transferable by delivery which were and are of no value, and no question as to negotiability arises in their case. The real state of the facts is, as Pearson J. found, that Easton, and not Lord Sheffield, was the principal in the transaction. Lord Sheffield authorized Easton to borrow £26,000 in any way that he could: Easton applied through Mozley to the banks, which Lord Sheffield knew of and authorized: Mozley's course of dealing was to pledge all his securities en masse to the bank, as securities for his own indebtedness, and Easton was aware of his course of dealing, and knew that he was pledging Lord Sheffield's securities for his own full indebtedness. The Court of Appeal took an incorrect view of the facts. It was essential to Lord Sheffield to have the £26,000 and he gave Easton carte blanche to raise it how he could. Easton and Lord Sheffield were co-plaintiffs below, and Lord Sheffield did not repudiate Easton till the middle of the action. The bank had the legal estate in the inscribed securities, and Lord Sheffield has no equity as against it. The bank knew that the securities might not be Mozley's own, but had no notice of a title in Lord Sheffield inconsistent with Mozley's dealings in pledging them as security for his own account. He had the jus disponendi. The legal title being in the bank the onus is upon the appellant to shew how he can undo his own act. It is not enough to say that its securities were known not to be Mozley's own, for Lord Sheffield had put him in a position to pledge them for his own debt; he had notice of what was being done, and knew the risk that he was running, but, as appears

(1) 12 App. Cas. 271.

from the evidence and correspondence, left the matter entirely in the hands of Easton, who was acquainted with Mozley's course of business. This was the view taken by Pearson J. If Easton were sole plaintiff his case would have been a hopeless one, and Lord Sheffield cannot be in a better position. *Cooke* v. *Eshelby* (1) is quite a different case. No knowledge that the limit was being exceeded was or could be brought home to the bank; but the bank having the legal title need not shew that they acted with due caution:" see *Foster* v. *Pearson* (2) per Parke B. See also *Perry Herrick* v. *Attwood* (3), *Briggs* v. *Jones* (4), and *Roffe* v. *Roscoe* (5), in the Court of Appeal in 1879, cited in *France* v. *Clark* (6).

Napier Higgins Q.C. (*F. Thompson* with him) for the Capital and Counties Bank, respondents:—

The bonds held by this bank were transferable by manual delivery, and were therefore negotiable securities. The doctrine of notice does not apply to negotiable securities: *Goodwin* v. *Robarts* (7) in the Exchequer Chamber, per Cockburn C.J., and in the House of Lords, per Lord Hatherley. *Gill* v. *Cubitt* (8) is no longer considered as law. To get rid of the title of the bank the appellant must shew mala fides or such gross negligence as in the eye of the Court is tantamount to mala fides, and of this there is no evidence. The securities being negotiable the bank does not lose its rights even by negligence, apart from mala fides, and there is no duty to inquire: Byles on Bills, p. 123 (12th Ed.); *Goodman* v. *Harvey* (9); *Crook* v. *Jadis* (10).

Cozens-Hardy Q.C. (*P. S. Stokes* with him), for the Royal Bank of Scotland, respondents, with whom had been deposited both stock and bonds, relied on similar arguments, and also on the fact that they had dealt not with Lewin Mozley, but with his relative Frederick Mozley in the ordinary course of business.

G. Cave for the respondent Young.

(1) 12 App. Cas. 271.
(2) 1 Cr. M. & R. 849, 855.
(3) 25 Beav. 205; 2 De G. & J. 21.
(4) Law Rep. 10 Eq. 92.
(5) Not reported.
(6) 26 Ch. D. 257, 264.
(7) Law Rep. 10 Ex. 337; 1 App. Cas. 467, 492–3.
(8) 3 B. & C. 466.
(9) 4 A. & E. 870.
(10) 5 B. & Ad. 909.

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Rigby Q.C. in reply.

The House took time for consideration.

1888. March 12. LORD HALSBURY, L.C. :—

My Lords, this is an appeal from an order of the Court of Appeal affirming the judgment of Pearson J. The action was substantially brought to redeem certain securities deposited with the respondents by a Mr. Mozley. Mozley had deposited them with the respondents as security for his, Mozley's, indebtedness to them, and no question arises as between Mozley himself and the banks; but Mozley had received them from one Easton, who had received them from Lord Sheffield, to whom they belonged, and the first question in debate is the extent of authority conferred upon Easton by Lord Sheffield. Pearson J. was of opinion that the authority conferred was such as to make Easton complete master of them, and enabled him to dispose of them as he might think fit. My Lords, I think Lord Sheffield neither intended to give nor did give any such authority. He limited Mr. Easton's authority to obtaining an advance by what may roughly be called a pledge of these securities to the extent of £20,000.

The nature of the transaction as between Lord Sheffield and Mr. Easton is, I think, clearly disclosed by Mr. Easton's letter of the 27th November 1882. That letter is as follows:—"Gravetye, East Grinstead, 27th November 1882.—Dear Lord Sheffield,—In accordance with our conversation on Saturday last I now beg to write you particulars of the way in which I propose you should enable me to raise the £20,000 you so kindly and generously said you would let me have if you could manage it. Mr. Lewin Mozley, of 31, Lombard Street (whose business it is to carry out such transactions on a very large scale, in conjunction with some of the principal joint stock banks) will advance me that sum for six months on the deposit of Grand Trunk Preference Stock (2nd and 3rd) of the present value of £26,000, or £27,000, and will pay the dividends as they fall due into your account at Coutts'. He will require blank transfers of the stock signed by you, and an order on Coutts' to deliver to the holder of the transfer the stock certificates."

For the carrying out of this transaction, which was a loan secured by what in form was a transfer of the legal estate, but in substance and according to the intention of the parties was a pledge, it was necessary that blank transfers of the several securities should be executed, and Lord Sheffield accordingly executed these blank transfers.

Now, as to the authority conferred upon Easton, it appears to me that Easton himself, on the 28th of November, accurately described his own authority. "I am authorized," he says, "to pledge for six months, and I undertake that the stock shall be re-transferred at the end of that time."

My Lords, I entirely agree with the Court of Appeal upon this question, and without minutely going through the correspondence, it is enough to say that no part of it seems to alter the arrangement made by the letters to which I have referred. So much for the actual authority. Now, the question really argued before your Lordships was, whether, assuming the authority of Easton to be thus limited, the circumstance shews a right in the banks to retain these securities, not only for the £20,000 or £26,000 thus advanced, but as security for the whole of Mozley's indebtedness to them. The banks clearly and rightly had the legal estate, they were purchasers for value, and the whole question resolves itself into a very simple question of fact: had the banks notice of the infirmity of Mozley's title to pledge the securities of his customers for the whole of his own indebtedness?

I think the effort of the banks to prove a custom (which failed) is conclusive against them to shew that they knew the nature of Mozley's business. I do not draw the most unfavourable inference which might be drawn from the answer of one of the witnesses, that he made a point never to inquire, when he dealt with money-brokers or lenders, where the securities came from. I think it was only a somewhat infelicitous phrase by which the gentleman in question sought to express his meaning that it was no business of his to inquire about Mozley's authority. I have no doubt he and his bank and all the other banks bonâ fide believed that as a matter of law they were entitled to deal with Mozley in taking from him these securities as security for his, Mozley's, debt, although they had been deposited with

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Mozley by his own customers as security for the different sums which they had borrowed from him.

I must say I can entertain no doubt that as a matter of fact the banks did know the nature of Mozley's business, and, singularly enough, each of the learned judges in the Court of Appeal came to that conclusion, although, with all respect, they do not accurately represent what the course of business was. Cotton L.J. says in terms: "Now I come to the conclusion, and I think we all did at the hearing, and so stated, that the banks must be taken to have known that the securities on pledge with them were, or the greater part of them were, securities taken by Mozley in the ordinary course of his business; that, I think, was the result." The Lord Justice then goes on to describe what was the course of Mozley's business in a way to which I cannot assent.

Mozley himself describes, in answer to Pearson J., what was his course of business. "Supposing," says Pearson J., "that £14,000 worth of securities were deposited by the gentleman who borrowed that £14,000, they were deposited by him simply as security for £14,000?" Mozley, in his answer, says:—"Upon his repayment of that £14,000 I was bound to return him any securities which he had deposited." He adds, "I lent money upon them, and up to the extent I lent upon them I could use them again." If this was the course of business which the banks knew, how can it be said that it would not be contrary to good faith for the banks to retain the securities, not only for the amounts borrowed upon them by the owners, but for what Mozley owed to them?

There is a phrase in the judgment of Fry L.J. in dealing with this part of the case which is ambiguous, but which, understood in one sense, I should assent to. He says: "The result of that course of business is equivalent to a notice to this effect, that the securities were not the property of Mozley, but that he had power to dispose of them so as to raise from the bank the entire sum it was intended to raise." It is obvious to ask "intended by whom?" Not certainly by Mozley's customers, if Mozley told the truth about the mode in which his business was conducted, and I think his account is confirmed by the acknowledged

practice of the bank to release particular securities in pursuance of the demands of his (Mozley's) customers. But I do not believe Mozley's business could have lasted a month if the banks had not allowed this system to continue by exchanging securities. Mozley was, as he says himself, entitled to pledge them to the extent to which he had advanced money upon them, and the conclusion I draw from the facts proved is that the banks knew very well the system of money-lending pursued by Mozley, and trusted to him that he would not over-pledge, so to speak, the securities of his customers. Otherwise the very first security refused to Mozley's customer upon his tendering the amount advanced upon it would have brought the whole business to a very speedy end.

My Lords, if this is the true view of the facts it is impossible to contend that the bank is entitled to the position of purchasers for value without notice. I think they had actual knowledge, but if they had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to inquire.

My Lords, I have said nothing upon the different character of the securities, since I think it is quite immaterial whether they were negotiable or not; the principles applicable to this case are equally applicable, and if the facts are as I have suggested the banks, as holders of a negotiable security, would be in no better position by reason of the negotiability of a security as to which they had knowledge or notice that it belonged to somebody else.

For these reasons I move your Lordships that the judgment of the Court of Appeal and that of Pearson J. be reversed, and that the plaintiff is entitled to the declaration he asks and the redemption of such bonds and securities as remain unsold, and an inquiry as to the value of the stocks and bonds sold, such value to be ascertained as at the time when the plaintiff demanded their redemption upon his tendering the amount of the debt and interest due upon them.

LORD WATSON:—

My Lords, Lewin Mozley, a professional money-dealer in the City, lent to one Easton, first the sum of £20,000, and then an

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additional sum of £6000, upon the security of stocks of the Grand Trunk Railway of Canada, and foreign railway and canal bonds. These securities belonged to the appellant, Lord Sheffield, who gave Easton no authority to use them except for the purpose of securing these two sums. Mozley obtained an advance from each of the three respondent banks upon a running mass of securities, which included part of the appellant's property. The appellant signed transfers of the railway stocks to persons who were in reality the nominees of the banks, on their being sent to him for execution by Easton; and these transfers, with the certificates of the stock and the railway and canal bonds, were delivered to the banks by Mozley. The bonds have been held by the Court of Appeal, upon the authority of *Goodwin* v. *Robarts* (1), to be negotiable instruments, and I see no reason to differ from that conclusion. The banks had thus the full legal title to the securities, and Mozley having become insolvent, they asserted their right to hold them, not merely against the sums for which they were impledged by Easton, but against the several balances due to them in account with Mozley. Hence the present litigation. It is conceded that the respondents are purchasers for value, and the only question in this appeal is whether they are also purchasers without notice of the appellant's interest.

The evidence discloses that it is customary for persons in Mozley's position to get large advances from banks in the city of London, by transferring their customers' securities in mass, to cover the whole advance; they engaging to keep the securities up to a certain limit of value; the bank, on the other hand, stipulating for the right to realise, at any time, for its own protection. It is, moreover, an essential condition of these transactions that the money-lenders shall be permitted to withdraw, from time to time, such securities as may be required in the course of their business, upon the footing of immediately restoring them, or substituting other equivalent securities for them. In fact, great part of their business consists in lending, at a higher rate of interest, moneys which they borrow from the banks, at a lower rate, upon the securities which they take from their own borrowers; and it is necessary to the continuance of

(1) 1 App. Cas. 476.

such a course of dealing that they shall be able to get back a customer's securities from the bank, whenever he has the right, and is prepared, to release them. It was held by the Court of Appeal (in my opinion rightly) that the practice thus prevailing between money-lenders and the banks has not grown into a proper commercial custom. In the language of Cotton L.J. (1), there is "no such general custom proved as would bind any one dealing with a money-dealer, unless it was shewn that he had notice of the practice, and he was proved to have dealt with him on the footing of that practice."

The evidence also establishes that, in the case of the advances for which the appellant's property was pledged to them, the respondents recognised and dealt with Mozley as a member of the money-lending class, and that he was permitted to exercise the usual privilege of withdrawing securities, and replacing them with others. But it is proved, and not disputed, that the appellant had no knowledge of the practice, and that he was not aware, before Mozley became bankrupt, that his property had been pledged for any greater amount than he had authorized Easton to borrow on its security.

Mozley, accordingly, stood in this position. In a question with the appellant he had a perfect right to use his own interest in the securities as a source of credit; and he had no authority and no right to deal with the appellant's interest by way of pledge or otherwise. At the same time the appellant, by his own acts, had invested Mozley with an apparent dominion and authority which would have enabled him effectually to dispose of the securities to persons who had no occasion to suspect his limited title.

In my opinion the character of the transactions between the respondents and Mozley was, of itself, sufficient to notify to them that his interest was limited. The bank officials, when examined before the judge of first instance, substantially admitted that they knew that the bulk of the securities lodged by Mozley were those of his customers; and, apart from the admission, it is matter of plain inference that they must have had that knowledge. Yet none of the respondents made any inquiry, either as

(1) 34 Ch. D. 106.

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to where the securities came from, as to the interest of Mozley in such of them as belonged to his customers, or as to his authority, from the original pledgors, to deal with their interests as well as his own. In these circumstances the case appears to me to be narrowed to this issue: Were the respondents justified in assuming, without inquiry, that Mozley had the appellant's authority to pledge the securities for their full value against the advances which they made to him?

Had it not been that the learned judges of the Court of Appeal were of a different opinion I should have entertained no doubt that the respondents were not entitled to rely upon Mozley's having authority to pledge the securities to their full extent. That appears to me to be a necessary inference from the principles regarding notice which were applied by the Court of Exchequer in *Foster* v. *Pearson* (1), and, more recently, by this House, in *Cooke* v. *Eshelby* (2). The Lords Justices seem to have accepted, as sufficient, the explanation given by the bank officials, that they believed Mozley had full power to deal with all the securities which he brought to them; although they assign no reason for their belief except the fact that they took the securities from him in the ordinary course of business; or, in other words, in the ordinary course of their dealing with a money-lender. Cotton L.J. said (3): "It is true that they knew, and that was at first my doubt, that they (i.e. the securities) were not to a very great extent the property of Mozley, but they knew it was the practice of Mozley and similar money-lenders to deal with their customers on the footing of mortgaging en bloc, to secure their own debt, that on which they advanced their money to their customers." That reasoning is logical, and might have been conclusive, if it had been shewn that it was customary for money-lenders to deal with their borrowers on the terms stated by his Lordship. But I can find no trace of such a custom in the evidence. What the respondents actually knew, was, that Mozley, in common with the rest of his class, was in use so to deal not with his customers, but with their securities, which is a very different matter. The course of dealing proved

(1) 1 C. M. & R. 849. (2) 12 App. Cas. 271.
(3) 34 Ch. D. 111.

is between the money-lender and the bank, and not between him and his customer, a practice which cannot affect the latter, unless he is aware of its existence.

It appears to me that the effect of the judgment appealed from is to deprive the appellant of his interest in these securities by virtue of a practice which admittedly ought not to affect him; and I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD BRAMWELL:—

My Lords, I will state what appear to me to be the facts and conclusions of fact in this case. The appellant authorized Mr. Easton, on two separate occasions, to pledge his—the appellant's—property for two separate sums of £20,000 and £6000. He did not authorize him to pledge them for any other or different debt. They were pledged for other and different debts, and, consequently, were pledged without the authority of the appellant. It is therefore unnecessary to consider what Mr. Easton or Mozley knew or did. I think there is no ground for imputing fraud to anyone, but unless the appellant authorized what was done he is not bound by it. Nor is it any use speculating as to whether he would have authorized it had it been explained to him that what was done was the usual and best way of raising money. He might or might not have authorized it. But he did not. What he did, however, as to his shares was to execute a transfer of them, which was duly registered; the legal estate in them became vested in some of the respondents, who, being purchasers for value, acquired a title which could not be set aside unless they had notice of the infirmity of the title of those from whom they claimed. So of the other property. Treating it as passing from hand to hand by delivery, the appellant can make good no claim to it except by proof of such notice. The only question then is, was there proof of or evidence on which we ought to find such notice?

I have used the expression "notice of the infirmity of the title," but I wish to guard against the notion that I think it precise and accurate; nor would it be right to say "notice that possibly the pledgor had no power to pledge as he did,"

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because that is always possible. The expression should be something like this: "Notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that inquiry should be made into such title." I daresay that this, like most definitions of such a character, is incomplete, but I think it correct for the present case. Now I cannot doubt that the pledgees had such notice. They must have known—I might say, certainly have believed—that the property was not Mozley's. I daresay they thought that in point of law he could validly do what he did. But he could not. It seems to me, then, that they cannot hold this property except for what the appellant authorized it to be pledged, and that the judgment should be reversed. It is remarkable that the respondents relied on neither of the judgments below. The Court of Appeal overruled Pearson J., I think rightly. There is no evidence that the appellant knew of any such practice as Mozley adopted. With respect to the judgment of the Court of Appeal, it seems to me wrong, and founded on the Court's forgetting that at the same time that the bankers lent their money they had the notice I have mentioned.

LORD MACNAGHTEN:—

My Lords, in this case Lord Sheffield seeks to redeem securities in the hands of the three banks who are respondents to the appeal. In order to raise a certain sum of money, and on certain terms defined in writing, Lord Sheffield placed the securities in question at the disposal of one Easton, with whom he was associated in some Egyptian speculation. Easton procured the required advance from Mozley a money-dealer. Mozley divided the securities and deposited them in three lots, together with securities belonging to other customers of his, in order to cover his accounts with the several banks. Lord Sheffield now appeals after two adverse decisions. Pearson J. who tried the case and the Court of Appeal have both rejected his claim. Their decisions are based on different and independent grounds. The Court of Appeal has held that the banks were purchasers for value without notice, and that they are therefore entitled to rely upon the legal title which they unquestionably obtained.

Pearson J.'s view was that Lord Sheffield entrusted his securities to Easton to deal with them as if they were his own; that Easton was aware of Mozley's way of raising money; that he therefore could not complain of what Mozley did; and that Lord Sheffield has no better right than Easton to question the title of the banks. Both these views have been presented to your Lordships, though Pearson J.'s view was somewhat modified at the bar.

The learned counsel for the appellant did not dispute the fact that the banks obtained the legal title, nor did they draw any distinction between the different classes of securities which were the subject of this action. They relied entirely on the knowledge which in their view of the evidence was brought home to the banks. The managers of the several banks were examined. Their evidence varies slightly in detail. The admissions in one case may seem to be more candid or more complete—that comes probably from the way in which the questions were put. The effect of the evidence in the three cases is practically the same. Mozley's business was well known. He was a money-dealer. He lent money to his customers on securities which they deposited with him. He pledged those securities to the banks who supplied him with the money. He got money as cheaply as he could and disposed of it on the best terms he could make. His profit was derived from the difference or margin between the rate at which he lent money and the rate at which it was procured. The banks knew that in most cases, if not in all, the securities which he deposited with them were not his own absolute property. That information was conveyed by the nature and extent of his business. And moreover his customers for the most part were persons on the Stock Exchange, and it was the usual practice for the banks on settling-days to deliver out to him the securities which he required to be released for the convenience of his customers on an undertaking to redeposit securities of equal value in the course of the day. On the other hand the letters of deposit which the banks took from Mozley purported to charge not merely Mozley's interest in the securities but the securities themselves, and to make the whole mass in deposit liable for Mozley's indebtedness. That, as one of the managers says, was "the general banking practice." Beyond that the bank officials

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did not care to inquire. One of them with equal candour and simplicity says, "We make a point never to inquire when we deal with money-brokers and money-dealers." It would not be fair to scan that answer too closely. Whatever it means —whether it implies absolute faith in the scrupulous regularity of the whole class of money-dealers, or the shadow of a suspicion of a possible alternative, or whether it be merely an off hand and perhaps injudicious disclaimer of curiosity in a matter which the witness took to be no concern of his—there is no difference in the result. The banks knew that the person who dealt with them as owner was not acting by right of ownership. They took for granted that he had authority, but for some reason or other they did not choose to inquire what that authority was. They relied either on some assumed custom or general usage of bankers or on Mozley's representations. If they relied on a custom the answer is, no such custom is proved. The Court of Appeal has held, and held rightly, that the evidence falls far short of anything of the kind. If they relied on Mozley's representations it turns out now that in this case his representations were not well founded, and as loss has occurred the loss must fall on those who trusted without inquiry to the representations which he made.

The learned judges of the Court of Appeal have come to the conclusion that the banks had notice that the securities in question did not or might not belong to Mozley, but they held that the effect of that notice was neutralized by Mozley's representation that he had power to deal with them as his own on the ground that the notice and the representation must be taken together. No authority was cited in favour of that proposition. It is difficult to see how it can be supported on principle. It is obvious that in every case where a person deals as owner with property which is not his to the knowledge of the person who deals with him there must be a simultaneous and concurrent representation of authority honestly believed in or else there must be actual fraud and dishonesty.

Feeling the difficulty of supporting the view of the Court of Appeal the learned counsel for the respondents fell back on Pearson J.'s view of the case. That view, as submitted to your Lordships, was somewhat disguised or modified, but in substance

the argument came round to Pearson J.'s view. In fact when once the alleged custom was out of the way there was no alternative. There is no room for a middle course between Pearson J.'s view and the view of the Court of Appeal. On this part of the case it is sufficient to say that the respondents are met by the correspondence between Lord Sheffield and Easton, which so far from authorizing Easton to deal with the securities as his own or to allow Mozley to raise money on them in what was termed "his own way," expressly limited and defined the object for which they were placed in his hands.

For these reasons I agree in the motion proposed by the Lord Chancellor.

[A discussion took place as to the form of the order, and the order set out below was eventually drawn up.]

Order of the Court of Appeal and judgment of Pearson J. reversed: Declared that the appellant is entitled to the declaration asked in the statement of claim, and to the redemption of such bonds and securities as remain unsold, and to an inquiry as to the value of the stocks and bonds sold, such value to be ascertained as at the time when the appellant demanded their redemption upon his tendering the aggregate amount of the principal moneys and interest due in respect of the several loans of £20,000 *and* £6000 *in the statement of claim mentioned, and to accounts of what was, at the date of the said demand for redemption, due from the respondent Easton to the trustee in the liquidation of Lewin Mozley for principal and interest in respect of the said loans respectively, and to payment by the respondents, the London Joint Stock Bank, Limited, and the Royal Bank of Scotland, to the appellant of the difference between the said values of the stocks which were the securities for the loan of* £20,000 *and the amount which shall be found to have been due as aforesaid in respect of that loan, with*

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interest on such difference at the rate of £4 per cent. per annum from the date of the said demand, and to payment by the respondents, the Capital and Counties Bank, Limited, and the Royal Bank of Scotland, to the appellant of the difference between the said values of the bonds which were the securities for the loan of £6000 and the amount which shall be found to have been due as aforesaid in respect of that loan, with interest on such difference at the rate aforesaid from the date of the said demand: Ordered, that without prejudice to any question between the respondents, the London Joint Stock Bank, Limited, and the Royal Bank of Scotland, or between the respondents, the Capital and Counties Bank, Limited, and the Royal Bank of Scotland, the said respondents do respectively contribute to the said respective payments in the proportions of the said values of the several portions of the respective securities for the respective loans held by them respectively: And that any question as to how, as between the same three respondents, or any of them, such payment or contribution ought to be made, be determined by the Chancery Division of the High Court of Justice: The respondents (other than Young) to pay the costs of the appellant both in this House and below, and repay to the appellant any costs paid by him to the respondents: Cause remitted to the Chancery Division.

Lords' Journals 12th March 1888.

Solicitors for the appellant: *West, King, Adams & Co.*

Solicitors for the London Joint Stock Bank: *Clarke, Rawlins & Co.*

Solicitors for the Capital and Counties Banks: *Robins, Cameron & Kemm.*

Solicitors for the Royal Bank of Scotland: *Gordon & Son.*

Solicitor for John Young: *R. S. Gregson.*

Referred to. JAMES *v.* HUTTON & COOK & SONS [1950] 1 K. B. 9

[HOUSE OF LORDS.]

GEORGE HARDY AND ANOTHER . . . . APPELLANTS; H. L. (E.) 1888 *June* 12.

AND

RICHARD FOTHERGILL . . . . . RESPONDENT.

Bankruptcy — Order of Discharge — Future and contingent Liabilities — Valuation—Debt provable—Covenant to indemnify against non-repair— "Liability incapable of being estimated" whether barred by Bankruptcy, where not submitted to Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 49.

The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants with the lessors to repair and yield up the demised premises in repair at the end of the term. Eight years before the term expired, the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act 1869, and obtained an order of discharge. The lessees were not scheduled in the debtor's statement of affairs, no notices were sent to them, and they tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant to indemnify. After the term expired the lessors having recovered damages against the lessees upon the covenants for repair, the lessees claimed an indemnity from the assignee in respect of his covenant to indemnify:—

Held, affirming the decision of the Court of Appeal (*Morgan* v. *Hardy* 18 Q. B. D. 646), that the claim of the lessees was barred, under sect. 49 of the Bankruptcy Act 1869 by the order of discharge, the effect of sect. 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the liquidation, unless an order of the Court declared it to be a liability incapable of being fairly estimated.

APPEAL from a decision of the Court of Appeal, reported as *Morgan* v. *Hardy* (1).

The pleadings and facts are set out in the report of the decision below. Briefly they were as follows:—

By indenture of the 9th of January 1833 the plaintiffs' predecessor in title demised to the defendants' predecessors in title certain messuages and hereditaments for a term of fifty years, seven months and twenty-two days, and the lessees covenanted from time to time and at all times during the term well and sufficiently to repair and keep in repair all the buildings, &c., and

(1) 18 Q. B. D. 646.

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also at the end or other sooner determination of the term to yield up the same well and sufficiently repaired and kept in repair. By indenture of the 19th of July 1873 the defendants assigned to Richard Fothergill and Ernest Thomas Hankey the premises comprised in the lease of 1833 for the residue of the term, and the assignees covenanted jointly and severally to perform all the covenants in the lease and to indemnify the assignors in respect of any breach of those covenants.

On the 5th of June 1875 Fothergill and Hankey filed a petition in bankruptcy. Their affairs were liquidated by arrangement, and on the 25th of October 1875 Fothergill obtained his discharge under the liquidation. The assignors were not scheduled in the statement of affairs, and during the liquidation proceedings no notices were sent to them, nor any claim made or proof tendered by them in respect of Fothergill's liability under the covenant of indemnity.

In February 1885 the lessor's representatives (Morgan and another) brought an action against the lessees' representatives (Hardy and another) for damages for breach of the covenants to repair and yield up in repair. The defendants brought in Fothergill as a third party, claiming an indemnity against him. He defended on the ground (inter alia) that he had obtained his discharge in the liquidation as above stated. At the trial Denman J. gave judgment for the plaintiffs against the defendants for £1680 (an amount determined by an arbitrator), and judgment for the defendants against Fothergill for the same amount.

Fothergill having appealed, the Court of Appeal (Bowen and Fry L.JJ., Lord Esher M.R. dissenting) set aside the judgment for the defendants against Fothergill and entered judgment for him against the defendants (1).

Against this decision the defendants now appealed.

April 23. Sir *H. James* Q.C. and *Lumley Smith* Q.C. (*Thomas Terrell* with them) for the appellants:—

The question is whether the liability of Fothergill to indemnify the original lessees was provable in Fothergill's bankruptcy. That depends on whether it was a liability capable of being

(1) 18 Q. B. D. 646.

estimated. If it was not, it was not provable. How could such a liability be ascertained? It is like a contract to marry. If there were a breach at the time of the bankruptcy, the liability would be provable because an estimate could be made, otherwise not. Here there was no breach, and the premises being in repair it must be presumed that they would be kept in repair. From the nature of the case it would be impossible to ascertain the amount: there is no guide: one window might be broken, or the whole premises might be tumbling down: the claim might be for £10,000 or one farthing.

[LORD HERSCHELL:—Would the covenant to indemnify the lessees against the rent be provable?]

That might be: but it is not this case. Even in that case there might be a difficulty. Who could say whether the trustee would assign to a solvent and substantial tenant or to a man of straw?

The Act of 1869 no doubt greatly enlarged the scope of provable claims, but there was no intention to include cases which in their nature were not capable of estimation. The definition of "liability" in sect. 31 is certainly very wide, but it must be read subject to the final clause "as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." None of those three modes of valuation is applicable to such a liability as the present.

But it is said by Bowen and Fry L.JJ., Granted that this liability is not capable of being proved, the creditor must go to the Court and get an adjudication to that effect, otherwise a discharge in bankruptcy bars the claim. But there is nothing in sect. 31 which compels this construction. It says "an estimate shall be made of the value of any debt or liability provable as aforesaid," and any person aggrieved by any such estimate may appeal to the Court and the Court may, if it think the value of the debt is capable of being fairly estimated, make an order to that effect, and in that case such debt or liability shall be deemed to be a debt not provable in bankruptcy. This provision for appealing to the Court is only given in cases where the trustee makes an estimate by which the creditor is aggrieved. But in practice the trustee always rejects the proof where he

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considers the debt not provable. Suppose (as in this case) the creditor thinks so too, he is not aggrieved. Why should he appeal against a decision with which he agrees? Moreover, that would not be a case of a person "aggrieved by any estimate," for there is by the hypothesis no estimate. The arguments against the view taken by the majority of the Court of Appeal are forcibly put in the judgment of Lord Esher M.R.

As to the authorities, the hardship of the old law is illustrated by *Mudge* v. *Rowan* (1) decided under the Act of 1849. But wide as the words of the Act of 1869 are, it is not every contract that is put an end to by bankruptcy. In *Breslauer* v. *Brown* (2) Lord Hatherley limits the provability of contingent debts to such as are "capable of estimation." The expressions of James and Mellish L.JJ. in *Ex parte Llynvi Coal and Iron Co.* (3) in describing provable liabilities are no doubt very wide, but they must be read in the light of *Ex parte Waters* (4), where Mellish L.J. put this very case—the liability of a lessee who had assigned his lease—and says it would not be put an end to by the bankruptcy, no one could properly estimate it. In *Linton* v. *Linton* (5), an order for alimony was held not provable because not capable of valuation, under sect. 37 of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), the words being similar. See also per Jessel M.R. in *Collyer* v. *Isaacs* (6). In *Robinson* v. *Ommaney* (7) a covenant not to revoke a will was held a contingent liability incapable of proof under the Act of 1849. The cases of *Ex parte Blakemore* (8) and *Ex parte Neal* (9) are clearly distinguishable: a liability to pay an annuity to a widow dum sola (as in the earlier case), or to a wife dum casta or during separation (as in the later), is capable of estimation on the same principle as the value of a life—by statistical tables.

[LORD HERSCHELL referred to *Williams* v. *Earle* (10).]

McIntyre Q.C. and *Clement Higgins* Q.C. (Sir *R. Webster* A.G. with them) for the respondent, contended that the judgments of Bowen and Fry L.JJ. were right and for the reasons there given.

(1) Law Rep. 3 Ex. 85.
(2) 3 App. Cas. 672, 681.
(3) Law Rep. 7 Ch. 28, 31, 33.
(4) Law Rep. 8 Ch. 562, 568.
(5) 15 Q. B. D. 239.
(6) 19 Ch. D. 342, 351, 352.
(7) 23 Ch. D. 285.
(8) 5 Ch. D. 372.
(9) 14 Ch. D. 579.
(10) Law Rep. 3 Q. B. 739.

[LORD HALSBURY L.C. referred to *Ex parte Jackson* (1).]

[THE EARL OF SELBORNE:—Suppose a covenant by a tradesman not to do a particular thing: e.g. carry on a business within a certain distance, and the tradesman becomes bankrupt. Could the covenantee prove in the bankruptcy? If so it would be a hard case: the assets would be diminished to the detriment of the other creditors, and the bankrupt would be free after his discharge to go and set up the business.]

Perhaps such a liability would not be provable, but that is not the present case: a negative covenant differs in principle from a positive.

Lumley Smith Q.C. replied.

The House took time for consideration.

June 12. LORD HALSBURY L.C.:—

My Lords, the question in this case seems to me to depend entirely upon the true construction of the 31st section of the Bankruptcy Act of 1869, but before proceeding to discuss the particular words now under construction it is not unimportant to notice the gradual steps taken by the legislature to extend the application of the bankruptcy law to future and contingent debts. Mr. Eden in a treatise published in 1826 points out that one of the most important and valuable alterations effected by the 6 Geo. 4 c. 16 was the provision which it contained with respect to proof of contingent debts. Prior to that Act contingent demands could not be proved under a commission taken out before the contingencies upon which they were made payable had taken effect. Nearly eighty years before that time Lord Hardwicke expressed a wish (2) in which Lord Eldon afterwards concurred (3) "that some gentleman might think of a clause which might remedy and settle the matter for the future." My Lords, from that time till the year 1869 I think the legislature has been engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, to make it provable

(1) 27 L. T. (N.S.) 696. (2) 1 Atk. 120.
(3) 9 Ves. 112.

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in bankruptcy against his estate and relieve the bankrupt for the future from any liability in respect thereof.

The question arose in respect of a lease and of a stipulation in the lease to leave certain premises at the end of the lease in good and tenantable repair, and the question is whether the liability of Mr. Fothergill, whose liquidation took place eight years before the lease had come to an end, continued notwithstanding that liquidation—equivalent in this respect to bankruptcy—and makes him liable to be sued for a breach of the covenant to which I have referred. That question in turn depends upon whether it is a liability which, in the language of the statute, can be fairly estimated. Now, with all respect to the Master of the Rolls I think the principle running through his judgment goes much further than the decision of this particular case and rather suggests that no contingent liability is assessable at all. It is true that there are many contingencies which are practically as matters of business valued every day. The risk of a voyage, the duration of a life, by calculation of the averages are fixed by actuaries and others; but if you were to take a single life, or the contingency of a single voyage, I think it might as reasonably be said that you could not fairly estimate the value of a contract dependent upon a life or voyage. It is also true that such liabilities as are now in question are not sufficiently common, or perhaps I should say are not so much in the habit of being estimated; but what is there in the nature of the thing which renders it less capable of being estimated? The word "value" itself is one upon which subtle distinctions might be taken, but the moment you introduce contingency as one of the elements which is to enter into the question of value it is apparent that you introduce the element of conjecture and opinion and get out of the region of actual fact. I do not therefore see why if any contingent liability can be valued this cannot be valued, and the introduction of the adverb "fairly" giving a jurisdiction to the Court to decide whether in particular cases a liability could not be *fairly* valued, seems to me to involve the principle that all liabilities subject to the express exceptions enacted by the statute were intended to be included, but that in the one case where the Court should adjudicate that the liability was such that at that time it could

not be fairly estimated, then and then only should the liability continue.

It seems to me that the construction contended for by the appellants strikes this provision out of the statute, which could only be necessary if the legislature had thought that the previous words had comprehended all conceivable liabilities. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be affirmed and I move your Lordships accordingly.

EARL OF SELBORNE:—

My Lords, the question on this appeal is, whether the liability of Mr. Fothergill, the respondent, upon a certain covenant of indemnity contained in an indenture dated the 19th of July 1873, was discharged by his statutory liquidation under the Bankruptcy Act of 1869. The appellants, being lessees of mineral and other property under a lease for fifty years and upwards, which continued in force till 1883, assigned the lease, by that indenture, to Mr. Fothergill, taking from him the usual covenants; one of which was to indemnify them from all the covenants in the lease, and from all claims and demands for or on account of their non-observance or non-performance. One of the covenants in the lease was to deliver up the demised premises, at the end of the term, "well and sufficiently repaired." That covenant was broken; and the lessors have recovered against the appellants 1680*l.*, damages for the breach. The breach did not occur till 1883, and the respondent had, eight years before, on the 25th of October, 1875, obtained his discharge under the liquidation. If his contingent liability under the covenant in question was proveable in the liquidation (as it was, if it would have been proveable in bankruptcy), it was put an end to by the discharge; if not, it is still subsisting, and the appellants are entitled to recover over from the respondent in this action the 1680*l.* damages which they have been adjudged to pay.

Denman J. before whom the action was tried, and the Master of the Rolls, in the Court of Appeal, held that the liability in question was not proveable in bankruptcy under the Act of 1869. But the majority of the learned judges in the Court of Appeal thought otherwise, and gave judgment for the respondent.

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The question is one of general importance, and it is singular that it is not covered by authority. Some authorities were cited at your Lordships' bar, and some were mentioned in the judgments of Bowen and Fry L.JJ. as supporting the conclusion at which they arrived. But all those authorities are, in my opinion, distinguishable from the present case; and the force of the general language of James and Mellish L.JJ. in *Ex parte Llynvi Coal and Iron Company* (1), on which Bowen L.J. placed considerable reliance, is (as it seems to me) neutralized by the concluding observations of Mellish L.J. himself in *Ex parte Waters* (*In re Hoyle*) (2). Before saying more about these authorities, I think it right to consider the question as it would stand independently of them.

It is not, I conceive, for your Lordships or for any other Court to decide such a question as this under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the legislature in the statute or statutes upon which the question depends. For the principle of the old bankrupt laws, which did not admit to proof any claims for liabilities contingent at the time of bankruptcy, much might perhaps be said. It might be a hardship upon the creditors, to whom debts were then due, that a merely possible future liability, which might never have matured into a debt at all, should be valued and admitted to proof, and to participation in dividends. In most cases, if any substantial dividend were paid, this would be a benefit to the person interested in the performance of the contract under which such liability would arise if the contingency happened; but there might also be cases in which it would be a hardship upon him to be compelled to prove such a claim, so valued, at a time when the estate of the bankrupt might be inadequate to pay any substantial dividend, instead of waiting for the occurrence of the contingency (if it ever should occur), and then taking his legal remedies against such property as the debtor might at that time possess, whether previously bankrupt or not. But the legislature, for whatever reason, has gone at least far enough to exclude from the consideration of the present question à priori arguments of

(1) Law Rep. 7 Ch. 28. (2) Law Rep. 8 Ch. 568.

that kind. And, in interpreting the statute of 1869 it is important to bear in mind the progressive steps taken in that direction.

The Act of 1849 (sect. 177) made "debts payable upon a contingency which should not have happened" at the date of the bankruptcy proveable, at a value to be set upon them by the Court, with a right to participation in dividends upon the amount so proved. By another section (178) it dealt differently with a "*liability* to pay money upon a contingency which should not have happened"; making this the subject of a claim, convertible into a proof in the event of the contingency happening before the claim was expunged (as it might be after the lapse of six months, on the application of the assignees, if the Court should so think fit); and in that event only.

The Act of 1861, besides making "demands in the nature of damages," to which the bankrupt was liable under any contract or promise at the time of adjudication, provable (though then unliquidated) authorized the person entitled to the benefit of any contract or promise by the bankrupt "to pay premiums upon any policy of insurance, or any other sums of money, yearly or otherwise, *or to repay to or indemnify any person against any such payments*," to apply to the Court to set a value upon his interest in the bankrupt's liability under such contract or promise, and to prove for such value, and receive dividends on the proof. Here it is to be observed, that in the case of a contract to repay or indemnify, if the burden were cast upon the party to be indemnified by reason of the failure of some third person primarily liable to make future payments (nothing being due at the time of proof), exactly the same difficulties which Mellish L.J. in *Ex parte Waters* (1) pointed out as standing in the way of valuation in a case more nearly resembling the present would occur. "No one" (said his Lordship) "could properly estimate whether an assignee would at any future period commit a breach, or, if he did, whether he would pay for it himself." Nevertheless the legislature thought fit to enact, by the 154th section of the Act of 1861, that such a contingent liability, under a mere contract to indemnify, not only might be, but should be, valued and admitted to proof.

(1) Law Rep. 8 Ch. 562.

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The proof clauses of the Act of 1869, under which the present question arises, are not confined (as those of the former Acts were) to certain specified kinds of contingent debts and liabilities, but they are expressed in general and comprehensive terms, so as (in the language quoted by Bowen L.J. from the judgment of the Lords Justices in *Ex parte Llynvi Coal and Iron Company* (1)) to indicate, primâ facie at all events, that "it was the object of the legislature to discharge the bankrupt from every possible liability."

With a saving, not material for the present purpose, "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication" are to be deemed debts provable in bankruptcy; and the word "liability" is for the purposes of the Act defined as including "any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury or as matter of opinion."

There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, &c.; which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy.

But the present is not a case of that kind. A contract to

(1) Law Rep. 7 Ch. 28.

indemnify against the non-performance of covenants in a lease, such as covenants to pay rent, or to keep the demised premises in repair, or to deliver them up in a proper state at the end of the term is, to all intents and purposes, "an obligation or possibility of an obligation to pay money or money's worth" on the breach of any such covenant: it is "an engagement to pay, or capable of resulting in the payment of, money or money's worth," if the contingency against which the indemnity is provided should occur. Unless excluded (according to the view of the Master of the Rolls) on the ground that the statute contemplates those liabilities only which are capable of being fairly valued, and that this particular liability is not capable of being fairly valued, it is, and must be included in those words.

What, then, are the provisions of the statute as to valuation? It has been seen that liabilities of which the value is not capable of being ascertained by fixed rules, but which are "assessable only by a jury, or as matter of opinion," are expressly included. I cannot but think that it would be possible for a jury, or for an arbitrator, to set some value upon a contract of indemnity of this nature; which, beyond all doubt, is valuable to the person entitled to the benefit of it. Suppose, for example, that no bankruptcy had occurred; and that the assignee of the lease wishing to get rid of it, negotiated with the assignor for a release from this covenant of indemnity: and that the assignor agreed to grant such a release, for a price to be fixed by arbitration. I cannot myself doubt that an arbitrator, looking into the nature and actual condition of the demised premises, and other material circumstances, might have set some estimated value upon the covenant of indemnity. If an arbitrator might have done so, why not the trustee, or the Court, or a jury, under the provisions for that purpose contained in the 31st section of the Act? Why should the difficulty be more insuperable in this case than under such a contract of indemnity as that already mentioned, for which provision was expressly made by the 154th section of the Act of 1861?

The provisions of the Act of 1869, as to the mode of estimating value, are, that it is to be done (1) according to the rules of the Court, as far as applicable; (2) when those rules are not

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applicable, according to the discretion of the trustee, subject to appeal; and (3) in case of appeal, by the judge (with consent) or a jury; unless the Court thinks that "the value of the debt or liability is incapable of being fairly estimated;" in which case the Court may "make an order to that effect;" and, "*upon such order being made*, such debt or liability shall, for the purposes of the Act, *be deemed to be* a debt or liability not proveable in bankruptcy." The word "fairly," and the mention of *debt* (i.e., a debt "not bearing a certain value"), in this context, are important. I cannot but think that the language of the section would have been different if the legislature had not intended all debts and liabilities coming within the terms of the general definition of the word "liability" to be proveable, unless, on consideration of the nature and circumstances of any particular case, the Court should think it "unfair," either to the other creditors or to the claimant, to attempt to place any value upon them for the purpose of proof. A substantial value might be unfair (if objected to and appealed against) to other creditors; a nominal or very low value might be unfair (if objected to and appealed against) to the claimant. If nobody objected, it might, in either case, pass. According to what seems to be the sound interpretation of the whole clause, the legislature intended that question, in all disputed cases, to be determined in the course of the proceedings in bankruptcy, and not left open for the determination of other Courts after the bankrupt's discharge; and in undisputed cases, or where no claim might be made to prove, all liabilities within the general definition were to be, and to remain, in the category of proveable debts.

The authorities (except the dictum of Mellish L.J. in *Ex parte Waters* (1)) are all in this direction; though I cannot say that I think the present case strictly governed by them. If, in *Ex parte Waters* (1), Mellish L.J. meant to intimate an opinion that the liability of a lessee who had assigned his lease, remaining bound to the lessor under his covenants in the lease, would never, under the Act of 1869, be proveable in bankruptcy, or put an end to by the discharge of the bankrupt, I can only say that such an expression of opinion was extra-judicial; and that I am not

(1) Law Rep. 8 Ch. 562.

able, myself, to find sufficient ground for it in the words of the statute. It is, indeed, possible that in such a case as the present, or in other cases to which fixed rules of valuation may be inapplicable, it might be proper for the Court having jurisdiction in bankruptcy, after considering the material facts and circumstances known or capable of being ascertained, and weighing the magnitude of the interest, on the one side, against the difficulty, on the other, of measuring those elements of contingency on which the liability might depend by any calculation of probabilities, to make an order to the effect that the liability was "incapable of being fairly valued." But in the present case this has not been done. My conclusion is that the order appealed from ought to be affirmed.

LORD FITZGERALD:—

My Lords, I entirely agree with the noble and learned Earl in his conclusions, and my excuse for adding anything is the great importance of the principle involved in the decision.

The question arises on the construction of certain provisions of the Act of 1869, and seems to me to be whether the contingent liability of Mr. Fothergill to the appellants constituted a claim capable of proof under the liquidation. That is the only question. The bankruptcy law, as it now exists, seems to depend on the great principle of equity—the doctrine of equality—that is to say equality amongst the creditors in the common shipwreck, and justice and humanity to the debtor if he gives up all his property —everything that he has—for equal distribution amongst his creditors, and has conformed to and has not violated the provisions of the bankruptcy law.

The present condition of this branch of our law was not accomplished all at once. It proceeded tentatively and struggled by slow degrees from the time at which it was a code to repress and punish those whom the law considered to be criminals and delinquents, until it threw off its barbarisms and became a code of equity and of justice. Lord Hardwicke, who expounded and advanced the true principles of the bankrupt law is reported more than a century and a half ago to have stated a principle which may be aptly referred to on the present occasion. In

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Ex parte Groome (1), he states, "The privileges of creditors to come in under a bankruptcy, and of bankrupts to be discharged, are co-extensive and commensurate."

That great Chancellor, who did so much in the illustration of equitable principles, was not happy in the reporters who have transmitted to us his judicial decisions. Atkyns' Reports have been styled "the flimsy notes of Mr. Atkyns;" but in the modern editions of his reports the cases have been examined into and verified by the records. The words which I have quoted probably are Lord Hardwicke's, and state with substantial correctness two of the main objects of the bankrupt laws—that *all* creditors should be entitled to come in and prove, and that the bankrupt should emerge from the bankruptcy freed from all his liabilities.

The progressive advance of the law as applicable to the question before the House, and its adaptation to existing requirements, is well illustrated by the sections of the Act of 1849 referred to by the noble Earl. Sect. 177 of that Act, which permits a claimant on the ground of a debt payable on a contingency which has not happened to apply, if he thinks fit, to the Court, and authorizes the Court to set a value on such debt and permit the creditor to prove for the amount, is taken from a prior Act, 6 Geo. 4, c. 16 (2); but the 178th section of the Act of 1849, which deals with a liability to pay money on a contingency which shall not have happened, was, I think, new.

Under the Act of 1869 *all* the property of the bankrupt then vested in or belonging to him, of every nature and kind (save property held by him in trust and certain excepted articles), and such property as he may acquire or may devolve on him during the continuance of the bankruptcy, is transferred to the trustee to be divided amongst the creditors in proportion to their proved debts; and when the statute comes to provide for debts and claims provable it would be difficult to string together words more comprehensive than are found in sect. 31, "all debts and *liabilities*, present or future, certain or contingent."

If it had been rested on these words alone I should hold that the contingent liability of the bankrupt to the appellants came within the language and the intention of the statute; but when

(1) 1 Atk. 115. (2) Sect. 56.

we reach the definition of "liability" in the 5th paragraph of sect. 31, the interpretation seems to me clear from all doubt.

There is then a provision for an estimate by the trustee "of the value of any liability *proveable as aforesaid*, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value."

Having reached the conclusion that the contingent liability of the bankrupt under his covenant with the appellants was the foundation of a claim which might be estimated in the bankruptcy and its estimated value proved as a debt, then the order of discharge under the 49th section operates as a release to the bankrupt from that contingent liability. There are circumstances in the case which make the result an apparent hardship on the appellants, but either from ignorance of the law or want of foresight or of proper advice they did not take the course pointed out by the 31st section, under which they might have obtained a proper estimate of the value of the liability, or on appeal have obtained the order of the Court declaring the liability incapable of being fairly estimated. Your Lordships cannot, however, relieve them from the consequences of this oversight. The progressive character of the bankruptcy statute law in reference to such a case as is before your Lordships is well illustrated by the provisions of the Act of 1883. That statute deals with the whole Act of 1869, and its definition of the "property" which is made available for creditors includes "money, goods, things in action, land, and every description of property whether real or personal, and whether situate in England or elsewhere, also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising or incident to property as so defined."

The language is stronger but not more comprehensive than that of the Act of 1869. The Act of 1883 in dealing with the proof of claims in respect of contingent liabilities adopts the provisions of the Act of 1869, though possibly in more vigorous language, simplifies the procedure and adds as to contingent claims "capable of resulting in the payment of money, or money's worth, whether the payment is as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent

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on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, *or as matter of opinion.*"

My Lords, I have been unable to adopt the ratio decidendi to be deduced from the judgment of the Master of the Rolls, or to accept his conclusion that the claim in question was incapable of being fairly estimated. My Lords, it seems to me that proceeding on fixed principles the only decision to be arrived at is to affirm the judgment of the Court of Appeal.

LORD HERSCHELL :—

My Lords, having had an opportunity of reading in print the opinion of the noble and learned Earl opposite, I do not think it necessary to state at length the reasons which have led me to the same conclusion. I entirely agree in the view of the statute which has been expressed by my noble and learned friend. I think he has put the correct construction upon it, and that when thus construed the conclusion is inevitable that the judgment of the Court below must be affirmed.

LORD MAGNAGHTEN :—

My Lords, the Act of 1869 was not the first attempt to release bankrupts from liability arising from contract. But for some reason or other the legislature had never succeeded before in hitting the mark.

Contrasting the material sections of the Act of 1869 with previous efforts in the same direction Mellish L.J. says: "It is quite plain that the object of these sections is, that the bankrupt shall be absolutely relieved from any liability under any contract he has ever entered into" (*Ex parte Llynvi Coal and Iron Company* (1)).

With one qualification that statement is, I think, perfectly correct as regards any liability capable of resulting in payment of money or money's worth. Sect. 31 of the Bankruptcy Act 1869 contains one exception, and one exception only. It excepts any case in which the Court on appeal thinks the value of the liability

(1) Law Rep. 7 Ch. 28.

incapable of being fairly estimated, and makes an order to that effect. Such a case is conceivable, but it is one, I think, very unlikely to occur.

It seems to me that according to the true construction of the section, unless a judicial declaration has actually been made in the terms of that provision, the liability of the bankrupt under a contract, however extreme the difficulty of valuing that liability may be, must be deemed to be a debt provable in bankruptcy, and therefore a debt from which the bankrupt is released by the order of discharge. It will not do to say that if there had been an appeal the Court would have made such an order, and therefore the liability is not a debt provable in bankruptcy. To put that gloss on the Act would defeat the object of the legislature. It would induce persons having claims against bankrupts to stand outside the bankruptcy and take their chance. It would open the door to litigation, and compel the Court to decide questions under conditions wholly different from those under which they ought to have been presented for decision. It would leave the bankrupt with unknown liabilities hanging over his head. Neither the bankrupt himself, nor his friends, who might be disposed to help him, could tell whether he was really a free man and in a position to make a fresh start in life.

But, then, it was contended that such a case as the present was not within the section at all. It was said with confidence that the liability was incapable of being fairly estimated. It was argued that the word "liability," as used in the section, must be understood with some large qualification. It was pointed out that the Act speaks of an "estimate" and of a "valuation"; could it have been meant, it was asked, that you are to estimate and value that which everybody knows to be incapable of estimation or valuation? Some stress, too, was laid on the concluding sentence in the section, which speaks of liabilities in regard to the mode of valuation as being "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." It was said that the expression "assessable by a jury," meant assessable on some known principle; and that the words "matter of opinion" did not mean any random opinion—mere chance and

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guesswork—but an opinion founded on some trustworthy data, though reasonable men might differ within certain limits as to the conclusion to be drawn from those data.

It is not very easy, I think, to deal with an argument presented in this form. It begins with assuming that the liability in the present case was incapable of being fairly estimated. The meaning of that expression, however, was not defined, nor was any attempt made to explain in what respects this liability differs from liabilities which the Act contemplates as capable of being estimated, though they may be affected by more than one contingency. The argument then proceeds to cut down or qualify the language of the Act, so as to make it square with the hypothesis from which the argument started. I should have thought the better course would have been to endeavour to ascertain the meaning of the legislature from the language of the Act, and then to apply the Act to the facts of the case under consideration. The Act, no doubt, uses the terms "estimate" and "valuation." But, at the same time, it recognises as capable of being estimated or valued liabilities which depend on any number of contingencies, and may result in payment of money unliquidated in amount. Moreover, the Act seems to treat every liability arising from contract, which may result in payment of money, or money's worth, as capable, at least primâ facie, of being estimated. This, I think, is plain from the circumstance that the power of determining whether any particular liability is capable of being fairly estimated or not is not given to the trustee in bankruptcy; it is given only to the Court on Appeal. And I am inclined to agree with what I understand to have been Lord Bramwell's view, that this provision is introduced rather ex majori cautela to meet a possible case of unforeseen difficulty, than as part or parcel of the ordinary administration of bankruptcy law. (See *Ex parte Neal, In re Batey* (1).)

The concluding paragraph of the section does not purport to define the meaning of the word "liability." By way of explanation, it deals with cases which had occurred under the earlier Acts and with decisions which had limited the operation of those

(1) 14 Ch. D. 584.

Acts, in accordance, no doubt, with their true construction. But for that paragraph the reported cases might have given rise to many arguments tending to narrow the construction of the Act. The last sentence in the paragraph, referring to the mode of valuation, reflects, I think, the language of Montague Smith J. in *Brett* v. *Jackson* (1), a case which was decided in February, 1869, and which must have been brought to the attention of the framers of the Act. It was there held that an annuity, the continuance of which depended on a variety of contingencies and the observance of a multitude of indefinite stipulations, was not provable under the Bankruptcy law then in force. "Here," says the learned judge, "there are no definite materials for making anything like a valuation. An actuary might form a loose opinion as to the probable continuance of the annuity; or a jury might form a rough estimate of its value. But that is a very different sort of computation from that which the statute means when it says that 'the Court shall ascertain the value.' It clearly points to a case where there shall be no difficulty or speculation; a sum to be worked out in figures from some definite and precise data." The two sorts of estimate, both in substance falling under the head of opinion, which were there held inadmissible, are expressly recognised and adopted by the Act of 1869, though the uncomplimentary epithets have disappeared.

Turning now to the assumption which lies at the foundation of the appellants' argument, I must say that I cannot see anything so very exceptional about Mr. Fothergill's liability. It was said that the trustee would have done a foolish thing if he had tried to estimate it, and that if he had put a value upon it, the Court on appeal must have set the estimate aside. I cannot agree in this view. A covenant such as that which has given rise to the liability as between the lessor and the lessee is not uncommon. It is not an uncommon thing for leases to be assigned, and for the assignee to undertake the assignor's liability. I cannot think that a person of practical experience in dealing with leasehold property would have any great difficulty in making a fair estimate of the value of such a liability when he was once made acquainted with the circumstances of the particular case. Nor do I think

(1) Law Rep. 4 C. P. 259.

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that the Court would set aside, as a matter of course, an estimate founded on reasonable probability and practical experience. Why should it be assumed that the Courts now-a-days are more wise or more incompetent than their predecessors? The Court of Chancery used to be very much in the habit of dealing with estimates of this sort of liability. It was a common thing formerly in the administration of the estates of deceased persons for a fund to be set apart out of the general assets to provide for the possible event of a future breach of any of the covenants contained in a lease held by the deceased. As to the generality of the practice before Lord St. Leonards' Act, I may quote Kindersley V.C. whose experience as master makes his testimony particularly valuable. "For a long time," he says, "it has been the practice of the Court, where the property comprised in the lease did not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach" (1). There he is speaking of liability under a covenant for payment of rent. But the practice, of course, extended to liability under any covenant in a lease. The practice was open to serious objections, but I am not aware that in any case like the present the master or the judge in chambers found any insuperable difficulty in arriving at a reasonable sum for the purpose in view. If it were possible to make a reasonable estimate for that purpose, I cannot see that there would be any great difficulty in valuing the liability for the purpose of the Act of 1869, or, in other words, in assessing the amount of compensation which under all the circumstances of the case ought to be paid for the privilege of having the liability cancelled altogether.

It appears to me, therefore, that the appellants' case entirely fails. They have not brought themselves within the exception mentioned in sect. 31. There is no judicial declaration that this liability was incapable of being fairly estimated. But I should be sorry if it were supposed that the appellants have failed on technical grounds only. I think the liability in question was, according to the true construction of sect. 31, a liability

(1) *Dodson* v. *Sammell*, 1 Dr. & S. 577.

proveable in bankruptcy, and therefore a liability from which Mr. Fothergill was released by the liquidation proceedings.

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Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 12th June 1888.

Solicitors for appellants: *Kingsford, Dorman & Co.*
Solicitors for respondent: *Field, Roscoe & Co.*

[HOUSE OF LORDS.]

(APPEAL COMMITTEE.)

JAMES BOWIE . . . . . APPELLANT;

AND

THE MARQUIS OF AILSA . . . . . RESPONDENT.

H. L. (Sc.)
1887
Nov. 18.

Practice—Petition to appeal in formâ pauperis—Question respecting alleged Public Right.

Upon a petition for leave to prosecute an appeal in formâ pauperis it appeared that the petitioner sought as one of the public to establish a right of fishing in a tidal river adjoining land belonging to the defender, and that subscriptions had been collected to assist the petitioner in the litigation:—

Held, that in the circumstances the application could not be granted.

PETITION that the appellant, James Bowie, be allowed to sue in formâ pauperis. It appears that while the appellant was temporarily residing in Ayrshire he was arrested in August, 1884, by the water-bailiff of the Marquis of Ailsa, the respondent, for poaching in the River Doon. He thereupon brought actions in the Sheriff Court and in the Court of Session against the Marquis, in which he prayed the Court "to find and declare that the pursuer as a member of the public" has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and all other fish which are not salmon, sea-trout, and whitling, or the young of salmon, sea-trout, and whitling, in the River Doon, at least in that part of it within the tidal influence of the sea.

Lord Trayner (Lord Ordinary) decided in favour of the

H. L. (Sc.) 1887 BOWIE v. MARQUIS OF AILSA.

appellant; but this decision was reversed by the Second Division of the Court of Session, Scotland, on the 18th of March, 1887 (1).

The Appeal Committee met on the 18th of November, 1887, and the agents and parties being called in

Mr. *Loch*, agent for the respondent, objected that the appellant was trying a question of public right, that a committee had been formed and subscriptions collected and publicly acknowledged to assist the appellant in this litigation.

[LORD MACNAGHTEN mentioned *Kinloch* v. *Secretary of State for India in Council* (2).]

Mr. *Allan*, agent for the appellants, read affidavits to the effect that the appellant had raised this action for his own protection and relying on his own resources, in consequence of the criminal process issued against him by the Marquis of Ailsa for fishing in the tidal waters of the Doon where he had fished for twenty years, and that he was not prosecuting this appeal on behalf of the public or any person other than himself.

[LORD WATSON referred to the record, where one of the witnesses said he had agreed to subscribe to help to carry on the case; that a subscription list had been drawn up and that he had put his name to it; and that the "pursuer told him he was going to try the case, and I told him I would assist." He (witness) handed the money which had been subscribed to the pursuer's agent.]

LORD WATSON:—

This is an action between the respondent, the Marquis of Ailsa, and the public in a question affecting the respondent's patrimonial title, and if this petition was allowed it would cause the

(1) 14 Court Sess. Cas. 4th Series, 649.

(2) In that case the appellant brought an action on behalf of himself and all other persons entitled under a Royal Grant to share in a certain booty, to compel the Secretary of State for India in Council to account for money alleged to be in his hands (7 App. Cas. 619). The Appeal Committee (Lords' Journals, 23rd May, 1881), refused the petition of the appellant to sue in formâ pauperis. The ground being that he was assisted by others interested in the fund. See also *Faulds, Jun.* v. *Vere*, W. N. 14th July, 1888, p. 162; Lords' Journals 10th July, 1888.

respondent much expense defending what might turn out after all to be his own undoubted property. In my opinion this petition ought to be refused.

LORD MACNAGHTEN concurred.

This decision was reported to the House and agreed to.

Lords' Journals, 22nd November 1887 (1).

Agent for appellant: *J. B. Allan.*
Agent for respondent: *W. A. Loch.*

[HOUSE OF LORDS.]

EDWARD . . . . . APPELLANT;

AND

CHEYNE AND OTHERS . . . . . RESPONDENTS.

(DECLARATOR, ETC.)

EDWARD . . . . . APPELLANT;

AND

CHEYNE AND OTHERS . . . . . RESPONDENTS.

(MULTIPLEPOINDING, ETC.)

(No. 1.)

Husband and Wife—Post-nuptial Settlement by Husband—Wife's Assent to Life-rent Provision—Jus relictæ.

A testator, between whom and his wife there was no ante-nuptial contract, by the third purpose of his settlement, directed his trustees to pay over the whole annual income of his estates to his wife for her life; and by the fourth purpose "after the death of the longest liver of me and my

(1) In *Faulds and Others*, appellants, *Vere and Another*, respondents, the action was by the respondents to obtain a declarator that their land was not subject to a public right of way, the appellants defending the action as being entitled to a public right of way (14 Court Sess. Cas. 4th Series, 425). On the 6th of July, 1888, the appellants petitioned for leave to prosecute their appeal in formâ pauperis, but the Appeal Committee (The Duke of Buckingham and Chandos, Lord Watson, and Lord FitzGerald), on the authority of the above case of *Bowie* v. *Ailsa*, rejected the application.

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wife to convert into money all my estate and with her consent and full approbation (in token of which she has subscribed this deed) to pay" (certain legacies). The deed contained no express discharge of the wife's terce and jus relictæ; and it reserved a power to the testator to alter or revoke. The wife signed the deed without any limitation being attached to her signature in the testing clause. She survived the testator for two months, but was incapable of transacting any business during that period:—

Held, affirming the decision of the Court of Session (11 Ct. Sess. Cas. 4th Series, 996) that although the wife's consent to the deed could not be carried beyond the fourth purpose, except so far as it necessarily implied approval of the other purposes, yet the fourth purpose and the antecedent provision of life-rent in the third purpose were so intimately connected that the wife must be held to have accepted the provision, and therefore, although the wife had the power to revoke her consent, her representatives had not, and their claim to her terce and jus relictæ was untenable.

CONJOINED appeals from the Second Division of the Court of Session, Scotland (1). The appellant, Allan Edward, was executor dative quâ next of kin of his aunt, the late Mrs. Margaret Edward or Baxter, widow of the late Dr. Boyd Baxter, solicitor, Dundee. The respondents are Dr. Baxter's trustees and executors. The appellant maintained—both in an action of declarator in which he was pursuer, and in an action of multiplepoinding raised with a view of ascertaining the rights of all parties by the respondents, and in which the appellant appeared as one of the defender claimants—that Mrs. Baxter, by her signature to Dr. Baxter's trust disposition and settlement had not renounced her jus relictæ and terce.

Dr. and Mrs. Baxter were married in 1827. No marriage contract was executed. The only child of the marriage predeceased his parents without issue in 1867. Dr. Baxter died on the 4th of August, and Mrs Baxter on the 15th of October, 1882, both over eighty years of age. Mrs. Baxter, though she survived her husband, was incapable of transacting any business, prior to her death, owing to the shock caused by Dr. Baxter's death. In fact, if she had lived a little longer, a curator bonis would have been appointed to her.

By his trust disposition and settlement, dated the 30th of September, 1881, Dr. Baxter conveyed his whole estate, heritable

(1) 11 Court Sess. Cas. 4th Series, 996.

and movable, to trustees, the respondents, for (inter alia) the following purposes:—

First, payment of debts: second, payment out of the residue of his estate after the death of his wife, of any further sum which his trustees in their absolute discretion should think proper to pay and contribute to the funds of the University College, Dundee, over and above the sum of £10,000 which he had become bound to contribute (and which he subsequently did pay prior to his death) towards the foundation of the said college; third, "I hereby appoint and direct my trustees, half-yearly or at such period as they shall find to be convenient, to pay over the free annual proceeds or income of my estate and whole effects, heritable and moveable, before conveyed, to my dear wife, Margaret Edward or Baxter, if she shall survive me, during the whole period of her life, to be used and enjoyed by her as she shall think proper; and I also direct and appoint my said trustees to give my said wife the freest use and enjoyment and disposal of all our or my household furniture of every description, and wines and other liquors, and generally of every article within or belonging to our house or establishment, including horses and carriage, my wish being that she shall be most liberally treated in such respects by my trustees with their assistance and advice, as she well deserves at my hands everything I can do for her, in return for her never failing kindness and affection to me, and her economical management of domestic affairs, I accordingly leave and bequeath to her said full life-rent use and disposal; fourth, "I direct and empower my said trustees after the death of the longest liver of me and my said wife, to realise and convert into money all my estate and effects, or such part or parts thereof as they may think proper, and that in such manner, &c., as they think fit; and after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed), I direct and appoint my said trustees to pay to the institutions, societies, and persons after mentioned, the following sums or legacies." Then followed six legacies to institutions and societies; the seventh a legacy to the husband of one of Mrs. Baxter's nieces and his wife, between them, and to the survivor of them; the eighth legacies of £2000

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in trust for each of four other nieces of Mrs. Baxter, excluding the jus mariti of their husbands. "Farther at the death of the survivor of me and my wife" I direct my trustees to pay "the following legacies," these included legacies to others of Mrs. Baxter's next-of-kin, and to relations not her next-of-kin. The legacies named in the fourth purpose amounted to a sum of £26,750, of which £16,000 was given to selected members of Mrs. Baxter's next of kin, £5300 was given to societies and institutions in the management of which Dr. Baxter took a leading part; £2850 more was given to relations of Mrs. Baxter, other than her next-of-kin, and to mutual friends and dependents of the spouses; while £2600 was given to Dr. Baxter's relations; fifth, "as regards our household furniture, except the articles, &c., afterwards specially mentioned," I direct my trustees "after the death of me and my wife to divide the same as equally as they can among" Mrs. Baxter's nieces and next-of-kin, the daughters then alive of her brother, the late James Edward, "but excepting from the said furniture" as well as his books, &c., the following "(1), the oval inlaid table in our drawing-room," which I legate to —— "over and above her share of our general furniture." "Further it is our wish that our nieces to whom shall fall in the general division of our furniture our sewed velvet chairs in the drawing-room shall preserve the same in their own custody as memorials of us;" sixth, the trustees were to apply and appropriate the residue of his estate as realised "to and for such useful and charitable or benevolent institutions, and such uses and purposes, religious or sacred, as they shall think proper," &c. The deed contained a power of revocation as follows: "and I reserve my own life-rent use of the whole premises, with full power to me at any time to alter, innovate upon or revoke." The testing clause was as follows: "In witness whereof I and my said wife have subscribed these presents written on this and the four preceding pages all with my own hand at Dundee, &c." Then follows the signatures: —Mrs. Baxter simply signing her name.

Upon Mrs. Baxter's death three documents of a testamentary character were found in her repositories, dated respectively November, 1827, October, 1828, and July, 1871. By the last of these Mrs. Baxter conveyed to her husband, should he survive

her, her whole means and estate, and appointed him to be her "sole executor and universal intromitter with her whole moveable means and estate and effects of every kind, and that for his own use and behoof, with full power to do everything competent to him as my executor, it being understood between us in case of his surviving me, that he will execute a deed of settlement or trust deed, to take effect at his death, in the terms and for the purposes settled and known to us both, with such necessary alterations as he may consider called for on account of any change of circumstances that may take place; with this duty he is solely and confidently entrusted, and in discharge of it no one shall interfere."

Dr. Baxter's whole estate amounted at his death to the sum of £71,120, consisting of £58,620 moveable funds and £12,500 on bond over heritable property in Scotland. Mrs. Baxter for many years before her death had been entitled to life-rent interests producing close on £1000 a year, which she allowed Dr. Baxter to receive as far as paid.

On the 6th of March, 1884, in the action of multiplepoinding, the Lord Ordinary (Lord Kinnear) repelled the claims of the appellant and others, so far as claiming jus relictæ and terce out of Dr. Baxter's estate; reserving the question of expenses. The appellant reclaimed, and the Second Division by interlocutor, dated the 27th of June, 1884, adhered; and found the appellant liable in expenses from the date of the Lord Ordinary's interlocutor. By interlocutor dated the 17th of July, 1884, the Lord Ordinary found the appellant liable to the real raisers (the respondents) in the expenses reserved by the interlocutor of the 10th of November, 1883, and the 6th of March, 1884, in so far as the same were caused by his appearance in the process.

In the action of declarator raised by the appellant the Lord Ordinary on the 7th of March, 1884, assoilzied the respondents, finding the appellant liable in expenses, and the Second Division by interlocutor on the 27th of June, 1884, adhered with additional expenses against the appellant.

The appellant having appealed from the interlocutors delivered in the action of multiplepoinding and that of declarator, the appeals were conjoined (1).

(1) Lords' Journals, 22nd Feb. 1887.

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1887. Nov. 17, 18. Sir *Horace Davey*, Q.C., and *McClymont* (with them *Rutherford*), for the appellant:—

Mrs. Baxter on her husband's death was put to her election whether she would take the testamentary provision or her legal rights (1). She never elected, in fact she was unable to do so (2), and her right of election is now transferred to her next of kin. There can be no doubt that if she had expressly accepted the life-rent in lieu of her jus relictæ and had not recurred to her legal claims her relatives could not withdraw her consent (3); but her signature at the end of the will only refers to the legacies in the fourth purpose. Some effect must be given to the words in the fourth purpose, and they were unnecessary if she consented to the whole of the provisions of the deed. In *Borrie* v. *Coldstream* (4) the question was, What was the effect of the wife signing a deed of settlement by her husband to which she was not otherwise a party? but there in the body of the deed the wife's rights were expressly discharged, and in the testing clause her signature was stated to be adhibited "in token of her consent." In the judgment in that case (5) *Guild* v. *Guild* (6) and *Murray* v. *Murray* (7) were cited, where the deeds contained no discharge of the wife's legal rights, and it was decided that the wife's signature to the husband's deed did not bar her claim. *Dunlop* v. *Boyd* (8) was similar to *Borrie's Case* (4). In *Leighton* v. *Russell* (9), no doubt, the husband had actually revoked the settlement; but the following passage from Lord Fullerton's judgment is in the appellant's favour (10): "This would be a different case, perhaps, if the husband had given up his power to

(1) *Bell* v. *Laurie*, May 14th, 1801; Hume, 486; *Hope* v. *Dickson*, Dec. 17th, 1833; 12 Court Sess. Cas. 1st Series, 222; *Selkirk* v. *Law*, March 2nd, 1854; 16 Court Sess. Cas. 2nd Series, 715.

(2) See as to curator bonis electing, *Blaikie* v. *Milne*, Nov. 14th, 1838; 1 Court Sess. Cas. 2nd Series, 18; *Morison* v. *Morison*, Dec. 3rd, 1880; 8 Court Sess. Cas. 4th Series, 205.

(3) See Lord Chelmsford in *Dunlop* v. *Boyd*, 3 Court Sess. Cas. 3rd Series H. L., at p. 50.

(4) June 30th, 1843; 5 Court Sess. Cas. 2nd Series, 1297.

(5) June 30th, 1843; 5 Court Sess. Cas. 2nd Series, at p. 1311.

(6) Mor. 6521.

(7) Mor. 6525.

(8) Nov. 2nd, 1863; 2 Court Sess. Cas. 3rd Series 1; affirmed on appeal 3 Ibid. (H.L.) 46; 37 Scot. Jur. 470.

(9) Dec. 1st, 1852; 15 Court Sess. Cas. 2nd Series, 126.

(10) Dec. 1st, 1852; 15 Court Sess. Cas. 2nd Series, at p. 133.

revoke. But can the mere fact, that the wife gave her consent to a deed which leaves everything in the power of the husband —which leaves him as free as if it had never been executed—can that by implication deprive the wife of her legal rights? It would need very clear authority to make me come to that conclusion." The wife's consent to the specific legacies cannot imply her consent to a life-rent.

Asher, Q.C., and *H. Johnson* (both of the Scotch bar), for the respondents:—

The question is, did Mrs. Baxter transmit by intestacy a right to claim her jus relictæ? It is not disputed that if a wife discharge her jus relictæ after marriage she can during her husband's life or after his decease recall that discharge; but the right to revoke her discharge is a personal right of the surviving wife, and cannot be exercised after her death by her representative where she has consented to a provision which would bar her claim to jus relictæ unless she revoked. A wife by signing the usual testing clause may bar herself of her jus relictæ, provided the deed is a settlement of the universitas of her husband's estate, and that even although the deed is wholly in the husband's favour: *Borrie* v. *Coldstream* (1); *Dunlop* v. *Boyd* (2). *Leighton* v. *Russell* (3) is distinguishable: there the husband executed a settlement disposing of his means at his death, the wife to have a life-rent of his estate while she survived him. The wife signed the deed and predeceased her husband: her husband destroyed this will, or at least it could not be found, and made a new will revoking all previous settlements. After her husband's death, the relatives of the wife having claimed the wife's share of the goods in communion, the takers under the new will attempted to prove the tenor of the first will to shew that the claim was barred, but the Court held that the wife's relatives were not barred in their claim on the ground that although the wife had consented to the first will, that consent was only available in the case of that will

(1) 5 Court Sess. Cas. 2nd Series, 1297.

(2) 2 Court Sess. Cas. 3rd Series, 1; affirmed on appeal, 3 Ibid. (H. L.) 46; 37 Scot. Jur. 470.

(3) Dec. 1st, 1852; 15 Court Sess. Cas. 2nd Series, 126.

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itself becoming operative (1). If the consent had been limited to one particular purpose of the settlement such limitation ought to be stated in the testing clause. With regard to the fourth purpose the wife expressly consented to the payment of certain legacies on a particular footing, namely, on the realization of the whole of the assets on the death of the survivor: that is absolutely unintelligible, unless she consented to the whole funds being tied up; and to accept a life-rent in lieu of her legal claims.

Sir *H. Davey*, Q.C., in reply.

Judgment after consideration.

LORD WATSON:—

My Lords, I have come, without difficulty, to the conclusion that the interlocutors appealed from ought not to be disturbed.

The general principles of law applicable to the case have not been disputed. When there is no ante-nuptial contract, and the husband makes a voluntary provision in favour of his widow, as in full of her legal claims, she is put to her election upon his pre-decease; and, in the event of her death before she has had the opportunity of making her choice, the right of election passes to her representatives. On the other hand, if the wife has, during the subsistence of the marriage, consented to accept the provision in substitution for her legal claims, she may retract her consent, as a donatio inter virum et uxorem; but her right of revocation being strictly personal cannot be exercised by her representatives.

The case of *Borrie* v. *Coldstream* (2) is an authority to the effect that the consent of the wife may be effectually given by her subscribing, for that purpose, a testamentary deed of the husband standing unrevoked at the time of his death. The same point was decided by this House in *Dunlop* v. *Boyd* (3), where it was held that the wife's consent remained valid and binding on her representatives, although the husband had subsequently

(1) 15 Court Sess. Cas. 2nd Series, at p. 134.

(2) 5 Court Sess. Cas. 2nd Series, 1297.

(3) 2 Court Sess. Cas. 3rd Series, 1; affirmed on appeal, 3 Ibid. (H. L.) 46; 37 Scot. Jur. 470.

revoked certain portions of the deed which did not affect the wife's provision, or the conditions upon which her consent was given. In *Leighton* v. *Russell* (1) Lord Fullerton expressed an opinion that a wife's consent expressed by her signature to a deed, revokable at the will of the husband, ought not to exclude her legal rights; but his opinion was not shared by the majority of the Court, and it is in direct conflict with the subsequent decision of this House in *Dunlop* v. *Boyd.* (2) The points actually decided in *Leighton* v. *Russell* (3) do not appear to me to touch the present case. There the husband survived his wife, and after her decease he revoked all prior settlements executed by him, and made a new testamentary disposition of his whole means and estate. After his death the wife's next of kin sued his executor for their share of the goods in communion at the time of her death, the defence of the executor being that the claim was extinguished by the wife's consent to the revoked settlement. It was admitted that the revoked deed was not extant, and the executor in order to instruct his defence, brought an action for the purpose of proving its tenor. The majority of the Court gave judgment in favour of the wife's next of kin upon these two grounds: (1) that the efficacy of her consent was dependent upon the deed becoming operative; and (2) that, assuming its tenor to have been as alleged by the executor, her consent related exclusively to her legal rights in the event of the husband dying before her, and had no reference to the rights arising to her next of kin upon her own pre-decease.

By his trust disposition and deed of settlement the late Dr. Baxter conveyed his whole estate, heritable and moveable, to the respondents as his trustees, with directions, first to pay debts; secondly, to make certain payments to a college in Dundee; and thirdly, to pay over the free annual proceeds or income of his estate to his wife, in the event of her survivance, during the whole period of her life. The fourth purpose of the trust runs thus:—"I direct and empower my said trustees after the death

(1) 15 Court Sess. Cas. 2nd Series, at p. 133.

(2) 2 Court Sess. Cas. 3rd Series, 1; affirmed on appeal, 3 Ibid. (H. L.) 46; 37 Scot. Jur. 470.

(3) Dec. 1st, 1852; 15 Court Sess. Cas. 2nd Series, 126.

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of the longest liver of me and my said wife, to realise and convert into money all my estate and effects or such part or parts thereof as they may think proper, or in such manner and at such time or times, and at such prices, as they think fit; and after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed) I direct and appoint my said trustees as soon as they conveniently can, or at such time or times as they consider proper, with full power to postpone the payment of any of the legacies underwritten, if my trustees think it expedient to do so, to pay to the institutions, societies and persons after-mentioned, or to hold in trust for behoof of such females as are after specified, whose husbands' rights are excluded, the following sums or legacies which I hereby legate and bequeath to them respectively." Then follows an enumeration of legacies to certain institutions and individuals, to the amount in all of £26,750, of which £16,000 is given to relatives of the wife. The fifth purpose of the trust makes specific bequests of household articles and other personal effects; and by the sixth purpose the testator bequeaths the residue of his estate to such charitable uses as may be selected by his trustees.

Apart from any consent given by Mrs. Baxter to her husband's trust deed, it is clear that had she survived him she would have been put to her election between the life-rent thereby provided to her and her legal rights as widow; and the only point arising for decision is, whether Mrs. Baxter, by her subscribing the deed, consented to accept the life-rent, and thereby deprived the appellant, as her executor, of the right, which he would otherwise have had, to make an election now. That is a question depending upon the construction of the deed.

I cannot assent to the argument submitted for the respondents, to the effect that Mrs. Baxter by subscribing the settlement as one of the parties to its execution, without any limitation appearing in the testing clause, became a consenter to all its terms and provisions. It is unnecessary to consider what would have been the effect of her subscription if there had been no reference in the body of the deed to the purpose for which it was adhibited; because part of the deed, the fourth purpose, expressly bears to

have been made "with her consent and full approval (in token of which she has subscribed this deed)." I think that declaration must be taken to be conclusive as to the purpose for which she signed, and I am consequently of opinion that her consent cannot be carried beyond the fourth purpose, except in so far as her assent to its provision necessarily implies approval of other parts of the deed. It appears to me, however, that the fourth purpose, and the antecedent provision of life-rent in the third purpose, are so intimately connected with each other that Mrs. Baxter must be held by plain implication to have accepted that provision. In the event of her being the survivor of the spouses, payment of the legacies bequeathed by the fourth purpose is deferred until her death; and upon the occurrence of that event, they are made a first charge upon the estate to be held at that time by the trustees, consisting of the universitas of the testator's estate, under deduction only of proper debts. In my opinion, her consent to that arrangement plainly implies that Mrs. Baxter not only agreed that the legacies should be paid, but made it a condition of her agreement that they should not be paid until the expiry of the life-rent right provided to her by the third purpose of the settlement.

I accordingly move that the interlocutors appealed from be affirmed, and the appeal dismissed.

LORD MACNAGHTEN:—

My Lords, Mr. Baxter's trust disposition states the purpose which Mrs. Baxter had in view in affixing her signature to it. That being so, it appears to me that it would not be proper to attribute to her signature a purpose wider than that which is expressed on the face of the document. Her consent and approval must, I think, be limited to the directions given to the trustees with respect to the payment of the legacies mentioned in the fourth purpose of the trust disposition. But even so limited, her consent and approval appear to me to be inconsistent with the present claim set up by her representatives. The legacies in question are to be paid after Mrs. Baxter's death. They are to be paid out of the universitas of the testator's estate, which is to be kept together during Mrs. Baxter's life. This appears to me

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to be inconsistent with the claim put forward on her behalf to withdraw from the operation of the will one moiety of the testator's estate, and to leave the legacies payable out of the dead's part only.

For these reasons, though not agreeing wholly with the grounds on which the decisions of the Courts below have been rested, I concur in thinking that the appeal must be dismissed.

LORD HALSBURY, L.C., concurred (1).

Interlocutors complained of in the conjoined appeals affirmed; and the conjoined appeals dismissed, the costs incurred by both parties in respect of the conjoined appeals to be provided out of the estate (2).

Lords' Journals, 12th March, 1888.

Agent for the appellant: *A. Beveridge, for A. P. Purves, W.S. Edinburgh.*

Agent for the respondents: *W. A. Loch, for Mackenzie & Kermack, W.S., Edinburgh.*

(1) See next case, post, p. 400.

(2) On delivering judgment in this appeal, it was not stated that the costs of the appeals were to come out of the estate, as was done in the next case (see *post*, and H. L. Minutes, 17th April, 1888) but on the 4th of May, 1888, Lord Watson stated to the Appeal Committee that that was the intention of the House; ordered accordingly.—Lords' Journals, 8th May, 1888.

[HOUSE OF LORDS.]

EDWARD . . . . . APPELLANT; H. L. (Sc.) 1888 March 12.

AND

CHEYNE AND ANOTHER . . . . . RESPONDENTS.

(COUNT AND RECKONING.)

(No. 2).

Husband and Wife—Married Woman—Separate Estate—Receipt of Income by Husband—Presumption of Gift—English and Scotch Law.

By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it has not been consumed.

The same circumstances which are in England held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland.

A married woman living with her husband in Scotland was entitled to the income of a fund settled for her separate use, which stood in the names of trustees of whom her husband was one; and he also acted as factor of the trust.

Payments of income were at first lodged in a bank to the credit of the wife's separate account, then to the credit of an account in the names of both husband and wife; but for many years previous to the husband's death, both before and after he became sole trustee, the income was paid into the husband's private banking account, and mixed with his own funds:—

Held, affirming the decision of the Court of Session (13 Court Sess. Cas. 4th Series, 1209) that these circumstances inferred a complete gift; and, in respect it had not been revoked by the wife, that her representatives were not entitled to an account of the husband's intromissions with her separate estate.

APPEAL from the First Division of the Court of Session, Scotland (1).

The appellant, Allan Edward, was executor-dative quâ next of kin of the late Mrs. Margaret Edward, or Baxter, widow of the late Dr. Boyd Baxter of Dundee.

The respondents were Dr. Baxter's trustees.

(1) 13 Court Sess. Cas, 4th Series,1209.

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The appellant raised this action against the respondents as Dr. Baxter's trustees in June, 1885, concluding for an account of the intromissions of Dr. Baxter as surviving trustee and factor with the trust estate of the late David Edward, merchant, Dundee, out of which Mrs. Baxter was entitled to a life-rent, exclusive of her husband's jus mariti.

The facts are fully set out in the opinion of Lord Watson.

On the 8th of December, 1885, the Lord Ordinary gave judgment in favour of the respondents, but without expenses, and their Lordships of the First Division, by interlocutor dated the 6th of July, 1886, affirmed that decision.

On appeal,

1887. Nov. 18, 19. Sir *Horace Davey*, Q.C. (with him, *McClymont* and *Rutherford*), for the Appellant:—

The presumption that the wife has agreed that her separate income shall be consumed in the household or disposed of by her husband, does not arise where the income of the wife has been retained by the husband and has gone to enlarge his own funds: see the Lord Justice Clerk (Hope) in *Hutchinson* v. *Hutchinson's Trustees* (1). That case decided that the presumption might be rebutted (2). Here there was evidence that some of the wife's income had not been consumed in the household but had been invested, and if that be proved the appellant asks that the case be sent back for an inquiry. The English cases shew that the Court is to draw an inference from all the facts. Although *Caton* v. *Rideout* (3) is a strong case against the appellant, yet there was one difference there, that the husband was not factor to the trust. *Rich* v. *Cockell* (4) and *Gardner* v. *Gardner* (5) decided that the husband could be a trustee for his wife, and once a trustee he was always a trustee unless his representatives could shew by clear evidence that the wife had agreed to destroy the trust. Here it is said that the husband and wife had a joint purse, but the investment of her money shewed that she did not

(1) 4 Court Sess. Cas. 2nd Series, at p. 1404.
(2) 5 Court Sess. Cas. 2nd Series, at pp. 472–3.
(3) 1 Mac. & G. 599.
(4) 9 Ves. 369.
(5) 1 Giff. 126.

treat it as such. Nor could it be successfully maintained that her income was required for the joint household expenses, as Dr. Baxter had himself an income of about £1000. Also there was no evidence that Mrs. Baxter knew her income was being dealt with.

Asher, Q.C., and *H. Johnston* (both of the Scotch Bar), for the respondents.

It is admitted that the greater part of the income of Mrs. Baxter's life-rent was received by her husband and paid into the credit of his own banking account, and was dealt with by him as his own money; and the four sums forming the separate investments are comparatively the same sums, being savings out of income. It follows that the income Dr. Baxter received was either contributed by Mrs. Baxter to the expenditure of the spouses and was expended for their joint purposes with joint assent, or otherwise there was a gift of the income by the wife to her husband. Where a wife sees her husband receiving the income of her separate estate and applying it to his own use, and makes no claim to that income, a donation to the husband must be inferred; and there is no difference in the law of England and that of Scotland as to the kind of evidence from which the inference will be drawn: see *Hutchinson* v. *Hutchinson's Trustees* (1).

That case in its later stage decided that the wife could not have an account of her husband's intromissions with her estate if she failed to prove her allegation that the income of her separate estate was applied by the husband to increase his own estate and was not consumed in the family; for if she failed to prove that, the legal presumption was that the disposition of the money was with her sanction. *Caton* v. *Rideout* (2) is undistinguishable, and Lord Cottenham's judgment specially applicable.

Dixon v. *Dixon* (3) was a case of breach of trust. A sum of £2800 was given upon trust to pay the income to the wife for her separate use on her receipt alone. It was invested in Government stock in the name of a surviving executor, who, at the request of the

(1) 4 Court Sess. Cas. 2nd Series, at p. 1404; 5 Court Sess. Cas. 2nd Series, at pp. 472–3.

(2) 1 Mac. & G. at p. 601; and see post, p. 391.

(3) 9 Ch. D. at p. 589.

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husband sold out and invested the proceeds in East India Railway stock in the joint names of himself and the husband, and they sent a request to the company to pay the interest to the husband. The surviving executor died, and the husband, without his wife's knowledge, sold out the stock and, appropriating the proceeds, deserted his wife, leaving her without support. The wife's claim to have the trust fund replaced and to be paid the arrears of dividends from the time the East India Railway stock was sold, was allowed, on the ground that though the wife might have been presumed to have assented to the husband's actual receipt of dividends while the stock remained intact, yet no such assent could have been presumed after it had been sold. There Sir George Jessel, M.R., stated the general rule: "As I understand the law, the wife is entitled to recover the arrears of her separate income. It is not like pin-money. In the case of separate estate she is entitled to recover the arrears of it, but if she consents to her husband receiving her income, and they have lived together, then she is not entitled to any account of it, either as against the trustee, who may pay it to the husband, or as against the husband himself. The whole of that depends upon her consent."

[LORD MACNAGHTEN mentioned *Beresford* v. *Archbishop of Armagh* (1).]

In *Rich* v. *Cockell* (2) the trustee took upon himself to transfer a legacy of £500 stock clothed with a trust for the wife's separate use to the husband quâ trustee, and it was held that in such circumstances the presumption was strongly against a gift by the wife; and that the transfer to the husband could not destroy the separate trust unless clear evidence was produced by the husband, that it was intended with her assent to destroy it. *Wright's Executors* v. *City of Glasgow Bank* (3) illustrated the presumption of a donation on the part of the husband. From all the facts here the presumption is that the wife from first to last intended to give the whole of her estate, whatever it happened to be, to her husband. The will of Mr. Baxter (4) is clear evidence that he

(1) 13 Sim. 643.
(2) 9 Ves. at p. 375.
(3) 7 Court Sess. Cas. 4th Series, 527.
(4) See previous case, ante, p. 375.

believed he had acquired all her income by gift, as he disposed of everything which appeared to be his, and Mrs. Baxter's signature seems to shew that she admitted that all the funds in hand were her husband's.

Judgment after consideration.

LORD WATSON:—

My Lords, Dr. John Boyd Baxter was married to Margaret Edward in the year 1827, and from that time they continued to live in family together, until his death in August, 1882. Mrs. Baxter died on the 15th of the following October. There was no marriage contract between the spouses, and the only child of the marriage died before his parents, without issue, in March, 1867.

Under the trust settlement of her brother David Edward, who died in December, 1857, Mrs. Baxter became entitled, after the lapse of two years from the truster's decease, to the life interest of a fifth share of the residue. The provision was declared to be alimentary, exclusive of the jus mariti and administration of her husband, and free from liability to his debts or the diligence of his creditors.

Dr. Baxter was one of the accepting trustees of David Edward's settlement, and also acted as factor for the trust; and on the death of Allan Edward in June, 1874, he became sole trustee. There appears to have been considerable but unavoidable delay in realising the trust estate, and a final division was not made until the 11th of April, 1866, when the trustees fixed and set apart funds and stocks, to the value of £12,382, as the share of residue life-rented by Mrs. Baxter, and appointed the interest to be paid to her during her life.

Between 1859 and 1865 the trustees made payments to Mrs. Baxter from time to time on account of her life-rent interest. These payments were at first placed to the credit of an account current with the National Bank, in her name, which was closed on the 10th of December, 1860, and the balance standing at her credit transferred to a new account with the same bank in name of both spouses, but bearing to be payable to either of them.

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Dr. Baxter alone drew upon this last account, all cheques being signed by him "pro Mrs. Baxter," and it was closed by a draft dated the 11th of November, 1865, for £409 1*s.* 6*d.* From the allocation of the residue in April, 1866, until the death of Allan Edward in 1874, the income arising from Mrs. Baxter's fifth was paid by the trustees to Dr. Baxter, who placed it to the credit of his private bank account; and the same course was followed after Dr. Baxter had become the sole trustee.

The appellant, as executor-dative of Mrs. Baxter, now sues the respondents, who are the testamentary trustees of her husband, for an account of his intromissions with her separate income derived from her brother David's trust. In bar of an accounting, the respondents maintain, in the first place, that Mrs. Baxter made a donation to her husband, which stands unrevoked by her, of all moneys which came to him from David Edward's trust, excepting such sums as he paid to her for her own use; and, in the second place, and alternatively, that such portions of her income as were in his possession at the time of his death were disposed of, with her consent, by his trust disposition and settlement. The appellant disputes both of these propositions; and, with respect to the period preceding 1866, he contends that there are four sums with which Dr. Baxter became chargeable as her trustee or agent. It is not said that Dr. Baxter intromitted with any part of her income arising before 1866, other than these sums, and, in that condition of the argument, I think it will be convenient, first of all, to deal with the income arising after the allotment of the share of residue life-rented by Mrs. Baxter.

By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift, in so far as it has not been bonâ fide consumed. The wife's consent to give need not be in writing nor in terms express; but may be matter of inference from the circumstances of the case, or the conduct of the spouses. So far as I am aware there is no case in which the Court of Session has had occasion to determine what conduct or circumstances will imply

a gift by the wife, unless the case of *Hutchison* v. *Hutchison* (1), is to be regarded as an authority, but English Courts of Equity have frequently considered the point; and their decisions being in pari materiâ, are, in my opinion, applicable to the present case. There can be no reason why the same circumstances which are in England held to imply donation, should be deemed insufficient to sustain a similar inference in the Court of Session.

In *Caton* v. *Rideout* (2) a widow objected to being charged, as executrix of her husband, with a cash balance of £555 standing at the credit of the deceased with Child & Co. The lady had a separate right to the dividends of stock standing in the name of trustees, of whom her husband was one. The trustees kept their banking account with Currie & Co., who at first paid the dividends to Child & Co. on her account, but for fourteen years before his death it had been their uniform practice to pay to Child's on the husband's account; and the sum in question was admittedly part of the dividends so paid to him. Knight Bruce, V.-C., was of opinion that, in these circumstances it had not been made out that the husband had received the dividends in any other character than that of her trustee or agent; but his judgment was reversed by the Lord Chancellor (Cottenham), who thus stated the rule applicable to such cases: "If the husband and wife living together have for a long time so dealt with the separate income of the wife as to shew that they must have agreed that it should come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she would otherwise be entitled to, should be received by him." His Lordship also said that "separate money of the wife, paid to the husband, with her concurrence or direct authority, to be inferred from their mode of dealing with each other, cannot be recalled. If I were to hold the contrary, I do not know to what extent such a decision would go. In ninety-nine cases out of a hundred separate property which is introduced as a protection to the wife, does not take effect; all things going

(1) 4 Court Sess. Cas. 2nd Series, 1399; 5 Ibid. 469.
(2) 1 Mac. & G. 599, pp. 601, 603.

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right, and no distinction being made, the question of separate property does not arise; the property is used as a common fund for the benefit of the family, and in that way naturally falls under the control and management of the husband."

The expression "of course for their joint purposes," occurring in the first of these quotations, may appear to be somewhat ambiguous; but it is obvious from his decision that the noble and learned Lord merely intended to say that the wife's tacit assent to her husband's receiving and using her separate income for joint family or other purposes would constitute an effectual gift, whether the sums received by her husband were expended on these purposes or were allowed to accumulate.

In *Beresford* v. *Archbishop of Armagh* (1) Shadwell, V.-C., in similar circumstances sustained the right of a husband's executor to a sum of £11,000, being the balance of the wife's separate income received by him, and remaining unspent at the time of his death. In Scotland the claim made by the surviving wife in *Caton* v. *Rideout* (2) would have been sustained, not because there had been no gift, but on the ground that she had power to recall it; but the claim made by the wife's executor in *Beresford* v. *Archbishop of Armagh* (1) could not have been sustained, because the power of revocation is personal to the wife, and cannot be exercised by her representatives.

Hutchison v. *Hutchison* (3) has not a very direct bearing upon the present case, although it does illustrate the principle upon which such questions are dealt with between husband and wife. In that case a widow sued her husband's representatives for an account of his intromissions with certain rents and interests from which his jus mariti was excluded. She alleged that the moneys had been received and accumulated by her husband, and were still extant; whereas it was averred by the defenders that they had been spent by him for family purposes. Her right to recover the moneys, so far as these remained unconsumed, and could be traced, was not in dispute. When the case first came before them the Second Division (4) recalled the Lord Ordinary's finding,

(1) 13 Sim. 643.
(2) 1 Mac. & G. 599.
(3) 4 Court Sess. Cas. 2nd Series, 1399; 5 Ibid. 469.
(4) 4 Court Sess. Cas. 2nd Series, 1399.

that the wife was not bound to contribute out of her separate estate towards the maintenance of the family, and remitted to him to hear parties as to the legal presumptions applicable to the case, and as to the relevancy of any offer of proof made by either party. When the case went back to him the Lord Ordinary found that it was relevant for the defenders to aver that such parts of the pursuer's income as were applied by her husband to the maintenance of the family were applied with her knowledge and consent; and also that her knowledge and consent might be competently proved by facts and circumstances only, as well as by direct evidence. The defenders reclaimed on the ground that the onus of proof was laid upon them; and the Second Division decided (1) that it was incumbent upon the widow to prove that the money was applied by the husband to increase his own funds, and was not used for family expenditure. Their Lordships also decided that if the widow failed in such proof, effect must be given to the presumption that all sums received by him had been used and consumed with her sanction and concurrence.

So far as it relates to Dr. Baxter's intromissions with his wife's income between 1866 and the time of his death, I am unable to distinguish the present case from *Caton* v. *Rideout* (2). For eight years the interest of her fifth share of residue was regularly paid to him by David Edward's trustees as it accrued, and was by him at once mixed with his own funds, and dealt with in all respects as his own property; and the same practice was invariably followed after he became the sole trustee. It must, in my opinion, be presumed (in the absence of evidence to rebut the presumption) that the uniform course of dealing, which was continued for sixteen consecutive years, without any assertion of her separate right by Mrs. Baxter, had all along her consent, or at least her tacit acquiescence. Proof has been adduced by both parties, but it does not appear to me to alter the aspect of the case. The bulk of it consists of the personal impressions (which are not evidence) of individuals connected with the family, derived from their observation of the terms upon which the spouses lived together, and from expressions used by Mrs. Baxter in their hearing. These expressions are quite consistent with

(1) 5 Court Sess. Cas. 2nd Series, 469. (2) 1 Mac. & G. 599.

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the theory of Mrs. Baxter having consented to place her separate income at the absolute disposal of her husband.

I shall now advert to the facts connected with the specific sums which, the appellant argues, were held by Dr. Baxter as trustee or agent for his wife. On the 10th of December, 1860, Mrs. Baxter drew £280 10*s.* from her own bank account, which was on the same day applied to the purchase of thirty shares of the Dundee and Arbroath Railway Company. Owing to that undertaking having been amalgamated with the Scottish North Eastern, which in its turn was absorbed by the Caledonian Railway Company, it has become impossible to discover in whose name the investment was made; and there is no evidence to shew that Dr. Baxter received the proceeds. On the 9th of June, 1862, £500 of Mrs. Baxter's money was lent to the Dundee and Arbroath Company upon a mortgage in her own name. The money was repaid on the 17th of May, 1869, when it was received by Dr. Baxter, and mixed with his own funds. On the 11th of November, 1864, another sum of £1000 was invested in a mortgage of the North Eastern Railway Company, payable to the spouses jointly, or the survivor of them. It was repaid at Martinmas, 1867, when the proceeds were not re-invested in similar terms, but were paid into Dr. Baxter's private account, and dealt with as part of his own funds. Again, on the 9th of November, 1865, £625 of Mrs. Baxter's money was lent, along with £375 of her husband's, on a mortgage of the North Eastern Company, payable in the same terms as the preceding. That mortgage was paid off by the company in November, 1868, but there is no evidence to shew how the proceeds were disposed of.

The appellant has thus failed to establish the receipt by Dr. Baxter either of the £280 10*s.* invested in 1860, or of the £625 invested in the year 1865. Assuming, however, that he did receive all of the four sums in question at the time when the investments were realized, I think that, in the circumstances of this case, the presumption must be that they were received by him as his own, for family or other purposes, with the knowledge and acquiescence of Mrs. Baxter. Without her intervention they could not have been realized; and, in my opinion, she cannot presumably have been ignorant of the manner in which the

proceeds were thenceforth dealt with by her husband. The first investment in railway shares has not been traced, but the three subsequent mortgages were paid up in 1867, 1868, and 1869 respectively. During these years Mrs. Baxter was in the practice of giving to her husband, for some purpose or other, the whole of her separate income from her brother David's trust estate, then amounting to nearly £500 per annum, a practice which continued until his death in 1882; and it appears to me to be neither an improbable nor an unreasonable inference from the facts proved, that she also gave him her savings during the time when her separate income from that source was much less than it became after 1866.

I am accordingly of opinion that the whole funds of which the appellant demands an account in this action were vested in Dr. Baxter as his own property at the time of his death and now belong to the respondents as trustees under his disposition and settlement. In that view it is unnecessary, for the disposal of this appeal, to enter upon the second branch of the argument submitted by the respondents, in support of the judgments of the Courts below. But having heard a full argument upon that part of the case, I desire to say that if there had not been a complete gift of these funds to Dr. Baxter, or if they had merely been placed in his hands with a view to their being disposed of by the testamentary disposition of both spouses, I should have been of opinion that the appellant was entitled to judgment. I had occasion to express in another case, and need not here repeat, my opinion as to the legal effect of Mrs. Baxter's signing her husband's settlement in token of her consent. The instrument does not profess to deal with any estate except that of the husband; and I do not think that Mrs. Baxter's signature could have been held as implying her assent to the disposal of any part of her separate estate, then subject to her dominion, which she had agreed to settle by a joint deed.

I, therefore, think the interlocutors appealed from ought to be affirmed and the appeal dismissed, and I move accordingly.

LORD MACNAGHTEN:—

My Lords, in this case the executor-dative of Mrs. Baxter seeks to recover from the testamentary trustees and executors of her

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husband, John Boyd Baxter, the aggregate amount of the income of a share of the estate of her brother, David Edward, to which she was entitled for life, for her separate use, under her brother's will.

Mr. and Mrs. Baxter were married in 1827 without ante-nuptial contract. Mr. Baxter died in August, 1882. Mrs. Baxter survived her husband for a short time, but during that period she was not competent to do any act affecting her rights. The question, therefore, must depend on the rights of the parties at the date of the husband's death.

The facts of the case are few and not really in dispute. The dispute is as to the proper inference to be drawn from the facts.

David Edward died in 1857. But several years elapse before his estate was realized. It was not until 1866 that the securities representing Mrs. Baxter's share, which amounted in value to about £12,000, were set apart. Mr. Baxter was a trustee, and after the 16th of June, 1874, the sole trustee of David Edward's estate. He was also factor to the trust. It cannot be doubted that Mrs. Baxter was aware generally of her rights under her brother's will. For a time the intention seems to have been to preserve her separate title to the moneys coming to her from the trust. On the first division of income an account was opened in her name with the National Bank, and for a time her share of the income, with the exception of what was paid to her personally, was placed to that account. In December, 1860, the account was closed, and the balance was carried to a new account, opened in the joint names of Mr. and Mrs. Baxter, with power to either to draw upon it. This account was closed in November, 1865, when the balance was transferred to Mr. Baxter's banking account. From that time Mrs. Baxter's separate income was paid directly to Mr. Baxter's account, and mixed with his moneys. From 1869 to 1880 inclusive, deposits were made from time to time in Mrs. Baxter's name with the National Bank. In July, 1881, the ultimate balance standing to the deposit account was drawn out and paid to Mr. Baxter's account.

In four instances, the latest of which occurred in November, 1865, sums derived from Mrs. Baxter's separate income are traced into investments either made in Mrs. Baxter's name or in which

she was recognised as having an interest. But these investments in course of time were realized or paid off, and it may be inferred, if it be not proved, that the proceeds came into Mr. Baxter's account and under his sole dominion.

Mr. and Mrs. Baxter lived together on most affectionate terms. They lived frugally. Mr. Baxter's own income was quite sufficient to meet their joint expenditure, and the result was that at his death the property, of which he was at least the ostensible and apparent owner, was largely composed of funds derived from Mrs. Baxter's separate income.

What is the proper inference from these facts? On the one side it is said that Mr. Baxter was never divested of the character of trustee, that he acted as his wife's banker, and that her representatives are therefore creditors on his estate for so much of her separate income as may appear to have been received by him and not duly accounted for. It was contended that at the very least his estate ought to be held liable for the proceeds of the four investments of her separate property which came into his hands. On the other side it was not disputed that originally Mrs. Baxter intended to keep her own property to herself, but it was said that she drifted away from that purpose, and finally abandoned it altogether. A reason for this change, it was suggested, might be found in the death of the only child of the marriage, who died without issue in March, 1867: after that event Mrs. Baxter could have no object in keeping her property separate. And it was argued that the proper inference from the facts and circumstances of the case was that Mrs. Baxter made a gift of her separate income to her husband.

In Scotland there seems to be no reported decision bearing directly upon the point. Where donations between husband and wife are liable to be revoked during the lifetime of the donor, the question could only arise in an exceptional case like the present, and so the dearth of authority is not to be wondered at.

In England from early times there have been numerous decisions and dicta upon the subject, where husband and wife have lived together and the husband has received the income of his wife's separate estate without objection on her part. In the older cases, generally speaking, no distinction appears to have been

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drawn between pin money and other separate income of the wife, and in some it is laid down that the wife shall have no account against her husband or her husband's representatives, in others it is said that the Court will only give the account for one year. Subject to these observations the rule in equity is clear from the earliest times, (and the cases go back to the time of Lord Macclesfield), that when husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive. The object of the rule, according to Lord Hardwicke, was "to prevent such accounts between husband and wife which it is impossible to determine according to the rights after death of the parties:" *Peacock* v. *Monk* (1). Since the Duchess of Northumberland's case, *Howard* v. *Lord Digby* (2), which was before this House in 1834, a distinction between pin money and other separate income of the wife has always been recognised, and since that case there is no English decision, so far as I am aware, which lends countenance to the notion that the Court will give any account against the husband or his representatives in respect of arrears of the wife's separate income, not pin money, received by him with her express or implied permission.

Where the circumstances are such that the wife's consent or acquiescence may fairly be presumed, the presumption arises immediately on each receipt by the husband, and bars all claim on the part of the wife or her representatives. To displace the rule it is not sufficient to shew that the wife's separate income has accumulated in the husband's hands and remains unspent: *Beresford* v. *Archbishop of Armagh* (3); or that the husband is himself a trustee of the wife's separate income: *Caton* v. *Rideout* (4); or that the wife is restrained from anticipation by the terms of the instrument under which her title is derived: *Rowley* v. *Unwin* (5). *Caton* v. *Rideout* (4) is generally referred to as the leading case upon the subject. There was no question or dispute there as to the rule; the difficulty arose simply from the position of the husband, who was one of the wife's trustees. Lord

(1) 2 Ves. Sen. 190.
(2) 2 Cl. & F. 634; 8 Bli. (N.S.) 224.
(3) 13 Sim. 643.
(4) 1 Mac. & G. 599.
(5) 2 K. & J. 138.

Cottenham there held, under circumstances similar to those in the present case, that the payment with which the wife sought to charge her husband's representatives was made to him as husband, and not as trustee. He states the rule to be that "separate money of the wife paid to the husband with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled;" and he adds, that "the practice between the husband and the wife is proper evidence to shew acquiescence and concurrence." Lord Cottenham refers the foundation of the rule to broad grounds of convenience and practice, and points out that the rule is necessary for the peace of families. Indeed, if the rule were otherwise it would be, as his Lordship observes, "impossible to tell what confusion might not be introduced into a family." It appears to me that a rule which rests on such a basis is a safe guide in considering a case to the circumstances of which, if it had occurred in England, the rule would undoubtedly have been applicable.

There remains to be considered the minor point as regards the proceeds of the four investments of moneys derived from Mrs. Baxter's separate income, a point which does not seem to have been pressed in the Courts below. It appears to me that these proceeds fall within the same rule. Assuming, in accordance with the principle laid down in *Rich* v. *Cockell* (1), that it is incumbent on the husband's representatives to shew by clear evidence that the separate trust in these moneys has been destroyed, I think the evidence is sufficient for the purpose. The investments represented accumulations of income. After Mrs. Baxter consented, as it must be taken she did, to her husband receiving her separate income, and dealing with it as his own, there was no reason for making a distinction between accruing income and income that had already accumulated when the accumulations were turned into money. As and when the investments representing these accumulations were realised, Mrs. Baxter's receipt must have been required and obtained. It is impossible to doubt that the payment to Mr. Baxter in each case was made with his wife's concurrence, that he received the proceeds in the character in which he was at the time receiving her separate

(1) 9 Ves. 369.

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income, and that he was intended to be as free from liability to account in the one case as he was in the other.

For these reasons, I am of opinion that the appeal must be dismissed.

LORD HALSBURY, L.C.:—

My Lords, I only desire to say that had it been necessary to decide any question with reference to the signature to the will, I should have been entirely of the same opinion as my noble and learned friends; but it seems to me that neither in the present case nor in that which we have just disposed of, is there any real doubt upon the principles of law on which it ought to be decided. The questions are simply questions of fact. I entirely concur in the view which has been taken of those questions of fact by my noble and learned friends, and I merely wish to add my assent to the judgment proposed and the reasons which have been given for it.

Interlocutors appealed from affirmed; and appeal dismissed; the costs incurred by both parties in respect of this appeal to be provided out of the estate.

Lords' Journals, 12th March, 1888.

Agent for appellant: *A. Beveridge, for A. P. Purves, W.S., Edinburgh.*

Agent for respondents: *W. A. Loch, for Mackenzie & Kermack, W.S., Edinburgh.*

[HOUSE OF LORDS.]

THE UNITED HORSE-SHOE AND NAIL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

JOHN STEWART & CO. . . . . RESPONDENTS.

H. L. (Sc.)
1888
March 12.

Patent—Infringement admitted—Action for Damages, Quantum of.

In an action by the pursuers, who were assignees of a patent for the manufacture of horse-shoe nails, for damages caused by the infringement of the patent it appeared that the pursuers did not grant licences, but themselves manufactured and sold the nails made by their patented machinery, and it was admitted that a number of boxes of nails manufactured in such a manner as to infringe the patent had been sold by the defenders:—

Held (reversing the decision of the Court of Session), that to the extent by which their trade was injured by the defenders' sales the pursuers were entitled to substantial damages; that the measure of damage was the amount of profit which they would have made if they had themselves effected such sales, deducting a fair percentage in respect of sales due to the particular exertions of the defenders, and that the mere possibility that the defenders might have manufactured and sold an equal quantity of similar nails without infringing the patent was no ground for reducing the damages to a nominal sum:—

Held further, that the fact that the pursuers had in consequence of the unlawful competition of the defenders reduced the price of nails which they had themselves sold did not entitle them to recover additional damages in respect of the reduction in the profits of such sales.

APPEAL from the First Division of the Court of Session, Scotland (1).

This was an action brought by the appellants, the United Horse-Shoe and Nail Company, Limited, against the respondents, John Stewart & Co., extensive hardware merchants in Glasgow, for damages in respect of infringement of inventions described in certain patent rights. These patent rights related to inventions in machinery for the manufacture of horse-shoe nails. The nails made by the appellants' patent machinery are known as "Globe" nails. The appellants did not grant licences, and they manufactured and sold the nails themselves. The respondents

(1) 14 Court Sess. Cas. 4th Series, 266.

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were the agents of manufacturers of nails known as the "Shoe" nails. The works of the appellants and of the respondents' principals were both situated in Sweden. The "Globe" nail was introduced into Scotland in 1879 by Messrs. Donald & Son, the appellants' agents. The "Shoe" nail was introduced into Scotland in March, 1883. To meet the competition the appellants had to reduce the price of "Globe" nails, and they subsequently received information that the nails sold by the respondents were made by Messrs. Kollen at their works in Sweden by means of machinery which the appellants believed were substantially a copy of the machines covered by their patents. They therefore on the 19th of January, 1884, brought an action against the respondents for infringements of their patent rights, and after a proof the Lord Ordinary (Lord Kinnear), who tried the case with the assistance of an assessor under 46 & 47 Vict. c. 57, s. 28, on the 20th of March, 1885, pronounced an interdict prohibiting the respondents during the continuance of the letter patent dated the 15th of August, 1872, patent No. 2432, and of the 14th of October, 1878, patent No. 4078, from importing into the United Kingdom or manufacturing or selling any horse-shoe nails made in accordance with the specifications of those letters patent. The respondents acquiesced in this judgment, and it became res judicata. In the course of the interdict proceedings the appellants reserved their claim for damages: and the respondents undertook to keep an account of all nails sold by them in alleged contravention of the appellants' patents. After the date of the interdict they ceased selling the nails complained of.

The present action was commenced on the 5th of May, 1885, and the appellants claimed for damages, (1) on the assumption that if the respondents had not interfered with their trade, they themselves would have sold during the period of interference an additional quantity of nails equal to the quantity sold by the respondents: (2) by the reduction of their prices which they alleged was necessary, and the direct result of the unlawful acts of the respondents: and (3), for loss sustained by the large extent to which their trade connection had been interfered with and spoiled. They averred that such nails as they sold could only be made by the use of their patents, and that had not the respon-

dents infringed they would have had the market to themselves. In order to limit the scope of the inquiry, the parties agreed before the proof was led to sign a joint minute of admissions. By this minute the respondents admitted that they sold 5752 boxes of nails made in contravention of claim 6 of patent No. 4078, and of claim 2 of patent 2432; but of these 5752 boxes 1390 boxes were made without the use of the mechanism called the interceptor described in claim 2 of patent 2432. The cost of producing the nails—taking the month of February, 1885—was equal to 6*s.* $\frac{1}{4}$*d.* per box of 25 lbs., and the profit which the appellants alleged they would have made on the 5752 boxes sold by the respondents at the prices then current was 2*s.* 1$\frac{1}{2}$*d.* per box.

The following table shews the fluctuations of discount the appellants alleged they were compelled to allow their sole agents in Scotland, Messrs. Donald & Son, from time to time, with the relative fluctuations of discount in the invoices of nails sent to the respondents by their Swedish correspondents:—

Respondents' Invoices.		*Messrs. Donald & Son.*	
Feb. 1883,	41$\frac{1}{2}$ per cent.	Mar. 1883,	42$\frac{1}{2}$ per cent.
June,	50$\frac{1}{2}$ „	June,	60 „
Oct.,	55 „	August,	55 „
Jan. 1884,	55 „	Oct.,	57$\frac{1}{2}$ „
July,	57$\frac{1}{2}$ „	Jan. 1884,	57$\frac{1}{2}$ „
Dec.,	57$\frac{1}{2}$ „	Feb. to April,	60 „
Jan. 1885,	57$\frac{1}{2}$ „	May,	55 „
Feb.,	57$\frac{1}{2}$ „	Dec.,	55 „

The following are the quantity of "Globe" nails sold by Messrs. Donald & Son down to the time of the interdict:—

1879	3,120 boxes.
1880	7,819 „
1881	9,270 „
1882	15,225 „
1883	14,357 „
1884	11,349 „
1885, first 3 months	1,800 „

After the interdict the number of boxes of nails sold from the 30th of March, 1885, to September, 1885, was 8583 boxes.

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On the 11th of March, 1886, the Lord Ordinary (Lord Kinnear), having heard the proof, without a jury, gave judgment against the respondents for damages, £530. He held (1) that the appellants' loss was the amount of profit which they would have gained from the sale of nails sold by the respondents if the respondents had not interfered so as to prevent the appellants from effecting those sales themselves. This profit he held to be the difference between the cost of manufacture and the prices at which the appellants were at the time selling to their own agents. And that on 5752 sold by the respondents, up to the interdict of the 20th of March, 1885, the profit would have amounted to £611, and his Lordship struck off 700 boxes which had been imported prior to the 27th of June, 1883, when the appellant company acquired right to the patents from two old companies, which brought the amount down to £530.

The appellants reclaimed, and the respondents took advantage of that reclaiming note, to ask the Inner House to find that the appellants were entitled to nominal damages only. They averred that in the interdict proceedings the appellants founded on five patents. With regard to three of them, Nos. 1, 2, and 5, the appellants failed. That the letters patent No. 2432 of 1872 concluded with two claims, but interdict was granted in respect of the second only. That the letters patent No. 4078 of 1878 concludes with six claims, but interdict was granted in respect of the infringement of one of the six, and that the least important claim.

On the 17th of December, 1886, the First Division of the Court of Session recalled the Lord Ordinary's interlocutor. Lord Adam, with whom the other judge concurred, was of opinion that it was not proved that either the patent 4078 or 2432 was of any value (2). He thought that the respondents could and would equally have competed with the appellants without using the patents at all, and that all the appellants were entitled to was nominal damages, or at most a sum to cover the possible profit which the respondents had made by their admitted use of the appellants' patents, which he suggests should be £50. Accord-

(1) 14 Court Sess. Cas., 4th Series, at pp. 270, 271.

(2) 14 Court Sess. Cas., 4th Series, 275 *et seq.*

ingly judgment was given against the respondents for £50; and in respect of a tender of £251 their Lordships found the respondents entitled to expenses since the date of that tender.

On appeal,

1887. Dec. 13, 15. *Rigby*, Q.C., and *Guthrie Smith*, (of the Scotch Bar,) for the appellants:—

The Court of Session were wrong in holding that the measure of the appellants' damage was the profit made by the respondents. The infringer of a patent may sell the product of his infringement at a reduced price so as to make no profit and yet damage the patentee's sale. The respondents allege that they only infringed an unimportant part of the appellants' invention, and that they might have manufactured these nails in another manner without doing the patentee any legal wrong, but the evidence adduced in support of this proposition was wholly irrelevant. It is competent to the House to review the facts, and also to assess the damages which ought to be given, and say that on the whole evidence the appellants are not only entitled to what the Lord Ordinary gave them, but over and above so much more per box of nails sold. The evidence proved that prior to 1883 the sale of the appellants' nails steadily increased in the Scotch market. It is not proposed to exclude the consideration of a competition by a supposed lawful sale of a similar article, but any such competition must be proved. Here the respondents admit that every box of nails they put on the market was an infringement. Of course the appellants must shew that if there had been no infringement they would have got the sale of those boxes, but reasonable probability is enough to shew that. At the time the respondents began to sell their nails there were twenty different kind of nails on the market competing with it; but although they were subject to all these competitors in 1879, their sales were on an average 250 boxes a month. In 1880 their sales were 651 a month; in 1881, 772; 1882, 1268. Then came the period of competition with the respondents, and the appellants' sales in 1883 fell to 1196 boxes; in 1884 to 945; and for the first three months of 1885 they only sold an average of 600 boxes a month. If this great reduction to less than half had been the

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result of anything else but the respondents' illegal interference no revival would have occurred after the interdict and consequent cessation of the respondents' sales, but in fact from that moment the appellants' sales were more than doubled. During the period of the competition a steady demand for these nails increased, this is shewn by the appellants' average of sales being 1099 a month and the respondents' 233, or a total of 1332. It follows that in all reasonable probability the appellants would have effected all these sales if the respondents had not effected them, and consequently obtained the profit thereon. The profits on 5725 boxes would have been £611 3*s*. But there also ought to be added to that, the loss caused by the reduction in price, or as regards the appellants the increased discount they had to allow. That argument applied to the 27,506 boxes sold to their agent by the appellants between 1883 and 1885, for if there had been no illegal competition they would have continued to sell at the old discount. There was also the loss of getting up the price again after the interdict. In *Yale Lock Company* v. *Sargent*, 1885 (1), it was held that "As the plaintiff, at the time of the infringement, availed himself of his exclusive right by keeping his patent a monopoly, and granting no licences, the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred, is to be measured, so far as his own sales of locks are concerned, by the difference between the money he would have realised from such sales if the infringement had not interfered with such monopoly, and the money he did realise from such sales. If such difference can be ascertained by proper and satisfactory evidence it is a proper measure of damages." In conformity with this principle the Court there decided that loss on the sales by the reduction of price should be allowed to the plaintiff as damages in a suit in equity for infringement, although the defendant made no profit.

[They also cited Wood, V.C., in *Davenport* v. *Rylands* (2), *Penn* v. *Jack* (3), *Betts* v. *De Vitre* (4), and *Neilson* v. *Betts* (5).]

(1) 10 Davis Sup. C. R. (U.S.) at pp. 536, 552.
(2) Law Rep. 1 Eq. at p. 308.
(3) Law Rep. 5 Eq. at p. 84.
(4) 34 L. J. (Ch.) 289.
(5) Law Rep. 5 H. L. 1.

Finlay, Q.C. (with him *Bigham*, Q.C., and *Ure* (of the Scotch Bar), for the respondents :—

The nature of the two letters patent infringed is such that it is clear no damages resulted to the appellant from the infringement. The sixth claim of patent 4078 is alone alleged to have been infringed. The object of that invention is to save waste in the punching of the nails, and that was only a small portion of the invention. Then the second claim of patent 2432 relates to a piece of machinery called an interceptor attached to the finishing machine, that never came into play unless the machine becomes clogged, but so easily is it dispensed with that a very large number of boxes of nails out of the 5752 sold by the respondents were made without it. Suppose that there are ten claims in a patent, and the tenth claim is for avoiding waste, and an infringer infringes that one claim for avoiding waste, and that only, and assume he is able to shew that the invention for avoiding waste is useless, can it be said that the patentee is to have the same amount of damages for the infringement of that part as if the whole patent had been infringed. *Seymour* v. *McCormick* (1), *Mowry* v. *Whitney* (2), and *Suffolk Company* v. *Hayden* (3), shew that the small value of the part infringed is of importance in a question of damages.

[LORD HALSBURY, L.C. :—You cannot in the face of the respondents' admissions do otherwise than assume the utility of the part of the letters patent used by them. The rule of law may be a hard one, but if you have infringed the appellants' patent, the materiality of the patent, although it is of the most trifling kind, does not come in question.]

Apart from that the appellants' own evidence proves that they would not have sold the 5752 boxes of nails sold by the respondents; and that the respondents' competition did not cause the fluctuation or lowering of their prices. Certainly the amount awarded by the Lord Ordinary was ample.

Guthrie Smith, in reply.

(1) U. S. R. 16 Howard, at p. 490. (2) U. S. R. 14 Wallace, 620.
(3) U. S. R. 3 Wallace, 315.

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LORD HALSBURY, L.C.:—

My Lords, no question arises in this case as to the title of the pursuers to recover against the defenders a judgment for such an amount of damages as the pursuers can establish to have been sustained by the infringement of the patent right whereof the pursuers are possessed.

I am unable to follow the object of the minute and very careful examination which has been made by some of the learned judges below as to the particulars of the patent or patents that have been infringed.

The actual infringement complained of consists of the sale of cases of nails produced by patent machines which are admitted to be infringements of the pursuers' patents. Every nail thus produced was an infringement of the pursuers' patent, the sale of which could have been interdicted, and would give a right of action against all concerned in its production and sale.

The question appears to me to arise solely on the assessment of damages. But I think the admissions in this case render unnecessary, and indeed irrelevant, an examination into the various parts of the patents.

The cases of nails tales quales were infringements, and in so far as these nails, such as they were, interfered with the sale of the pursuers' own goods, they were properly the measure of the damages which the pursuers were entitled to obtain. I say so far as they interfered with the sale of the pursuers' own goods, and while I agree with the Lord Ordinary that the pursuers can only recover compensation for the actual loss which they have sustained, the estimate of the particular sum which is to be arrived at when assessing compensation for the injury is purely a matter for a jury, and can rarely be made the subject of exact arithmetical calculation.

I am satisfied, however, that the boxes and cases of nails sold by the defenders did, in fact, interfere with the pursuers' sale. I am unable to agree with Lord Adam that there is nothing in the proof to shew or make it probable that the pursuers would have made these sales. I do not say *all* these sales. I think there is considerable evidence to shew that purchasers generally would have sought that particular nail, and I do infer that the pursuers,

but for the intervention of the defenders, would have effected a large part of these sales. And I certainly find from the evidence that among the competing nails in the market they were not all equally sought after, but that the pursuers' nails had a higher reputation. I think it is nothing to the purpose to shew, if it is shewn, that the defenders might have made nails equally good and equally cheap without infringing the pursuers' patent at all. I will assume that to be proved, but if one assumes that the nails which were, in fact, made by the pirated machines injured the pursuers' sales, what does it matter if it is ever so much established that the loss which the pursuers have sustained by the unlawful act of the defenders might also have been sustained by them under such circumstances as would give the pursuers no right of action?

Your Lordships have to deal with the facts as they exist, and those facts, as I say, are that the defenders have in derogation of the pursuers' rights sold cases of nails which they had no right to sell, and for which to the extent to which they have interfered with the sale of the pursuers' patented nails the pursuers are entitled to damages.

The difficulty I have had in the conclusion at which one should arrive in this case consists in this: that while the only ground upon which I can suppose the judgment appealed against could be supported would be that there was a bare infringement of right without any proof of damages, the judgment for £50 appears to me not to be reconcilable with the idea of nominal damages. And the judgment of the Lord Ordinary, with which I concur, that the pursuers were entitled to recover substantial damages hardly appears to me adequately to represent the amount of damages which the learned judge held to be proved. In short, the judgment of nominal damages results in a judgment for damages that are not nominal, and the judgment for substantial damages results in a judgment for damages which are hardly substantial. But I so far agree with the Lord Ordinary that, in arriving at the exact figure, it is extremely difficult without further materials to arrive with any confidence at a different sum to that which the Lord Ordinary has assessed. I have come to the conclusion, therefore, that I must treat the question as treated

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by the learned judges below as being a question between substantial and nominal damages, and if the former then we must restore the judgment of the Lord Ordinary, even as to amount, though with some hesitation for the reason I have indicated as to whether the precise amount arrived at is that which a very minute examination of the evidence would altogether justify.

I therefore move your Lordships that the interlocutor appealed from be reversed and that the judgment of the Lord Ordinary be restored; but inasmuch as the litigation has resulted in a restoration of the judgment arrived at by the Lord Ordinary, and as the appellants were those who first appealed against that judgment, I think there should be no costs beyond the costs originally incurred, that is to say, that the appellants should have the costs of the proceedings before the Lord Ordinary, but not further.

LORD WATSON:—

My Lords, the appellant company sell through their agents, John Donald & Son, of Glasgow, horse-shoe nails made at their works in Sweden; and for the purposes of their manufacture they retain the exclusive use of two patents for improved machinery, to which they have acquired right by assignment. Messrs. Kollen, who are also nail manufacturers in Sweden, between February, 1883, and March, 1885, supplied to the respondents 6215 boxes, each containing 25 lbs. weight of horse-shoe nails produced by machinery which violated the appellants' patent rights; and of these 5752 boxes were sold by the respondents before the 20th of March, 1885. On that date the appellants obtained a decree interdicting the respondents from selling or using any horse-shoe nails made in accordance with the patents. The respondents thereupon ceased to sell the nails in question.

The present action was brought by the appellants for damages in respect of injury to their trade occasioned by the competition which they encountered in the Scotch market from the nails illegally sold by the respondents. They allege that their average sales were thereby diminished, at least to the extent of the 5752 boxes actually sold by the respondents; that they were compelled to dispose of their own nails at lower prices than they would otherwise have obtained, and that notwithstanding the

withdrawal of the interdicted nails from the market, their trade will not recover its former position, either as regards extent of sales or prices for a considerable time. The respondents do not impeach the decree of interdict, which is now res judicata; but they maintain that this is a case of damnum sine injuria, and that the appellants can only recover nominal damages.

The Lord Ordinary (Kinnear), after a proof had been taken before him, assessed damages at £530. The appellants being dissatisfied with the sum awarded them, presented a reclaiming note, of which the respondents likewise availed themselves; the result being that the judges of the First Division unanimously altered the Lord Ordinary's interlocutor, and reduced the damages to £50.

It is hardly disputed that as a matter of fact the sale of the respondents' nails which were known as the "Shoe" brand, did interfere with the appellants' sale of their "Globe" nails, manufactured by their patent machinery. The goods were of much the same quality; and the respondents' own witnesses state that they were in the habit of purchasing whichever of the two nails was at the time the lowest priced. The evidence of Mr. Lamb, the respondents' traveller, shews that their goods were in constant and direct competition with those of the appellants. On one occasion he had to discontinue his attempts to sell his "Shoe" brand, in consequence of a recent reduction in the price of the "Globe" nails; and he accordingly communicated with the respondents, and "got a reply to sell at the same prices as the "'Globe.'" It is also established that the appellants' sales, which in 1882 had reached an average of 1268 boxes per month, were reduced during their two years of competition with the "Shoe" nails to a monthly average little exceeding 1000 boxes, which were disposed of at lower prices than they had previously been able to obtain. These are facts which primâ facie entitle the appellants to substantial and not merely to nominal damages. The grounds upon which the learned judges of the First Division have held that only nominal damages are due, appear to be these: that the Messrs. Kollen, in the manufacture of the "Shoe" brand nails, used a very inconsiderable part of the appellants' patents, and that if they had not infringed at all they would still have

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produced nails of the same class, which would have competed as successfully with the appellants' goods as the nails which they illegally sold.

Lord Adam, who delivered the leading judgment, said: "On the whole matter I have come to the conclusion that if the patent is used exactly as described in the letters patent, no saving is effected, but the reverse, and that, in any view, the saving is so immaterial that I have no doubt the defenders, without its use, would still have manufactured their nails, and competed with the pursuers, just as they are doing now." The Lord President and Lord Mure concurred in the views expressed by Lord Adam. Lord Shand was of opinion that it had not been shewn that the adoption of parts of the respondents' patents was of material advantage to the appellants; and that had the interdict been granted at the date when that process was brought into Court, and the invasion of the patents then discontinued, the respondents would have been in the market "as competitors, all the same, with nails in all respects the same, but manufactured without the use of the parts of the patents already noticed."

Towards the close of his judgment Lord Adam expresses the opinion that the appellants were entitled to the profits derived from the illegal use of their patents; and cites a decision of the Supreme Court of the United States, *Mowry* v. *Whitney* (1), to the effect that the measure of profits recoverable is the saving in the cost of manufacture effected by such use; and it is on that footing, apparently, that his Lordship arrived at the estimate of £50. Lord Shand adopts the same principle, which is manifestly erroneous. It was held by this House in *Neilson* v. *Betts* (2) that a patentee cannot claim both profits and damages, but must choose between them; and the appellants have made their election by raising the present action.

When a patentee elects to claim the profits made by the unauthorized use of his machinery, it becomes material to ascertain how much of his invention was actually appropriated, in order to determine what proportion of the net profits realized by the infringer was attributable to its use. It would be unreasonable to give the patentee profits which were not earned by the

(1) U. S. R. 14 Wallace, 620. (2) Law Rep. 5 H. L. 1.

use of his invention. But the case is altogether different when the patentee of machinery, who does not grant licences, claims damages from an infringing manufacturer who competes with him by selling the same class of goods in the same market. In that case the profit made by the infringer is a matter of no consequence. However large his gains, he is only liable in nominal damages so long as his illegal sales do not injure the trade of the patentee; and however great his loss, he cannot escape from liability to make full compensation for the injury which his competition may have occasioned. Every sale of goods manufactured, without licence, by patent machinery, is, and must be treated as an illegal transaction in a question with the patentee; and its inherent illegality is not affected by the circumstance that the infringement consisted in using a small, and, it may be, the least useful part of the invention. When it had been conclusively found that they infringed, it was no longer open to the respondents to impeach the utility of those parts of the appellants' patents which were copied in the Messrs. Kollen's machines. If these parts are not commercially useful; if, as Lord Adam holds, they effect no saving in the manufacture of nails, but the reverse, it would necessarily follow, either that the patent was wholly void, or that there was no substantial infringement which could entitle the patentees to an interdict.

The object of inquiry, in a case like the present, is the quantum of injury done to the trade of the patentee by the illegal sales of the infringer. That must always be more or less matter of estimate, because it is impossible to ascertain, with arithmetical precision, what in the ordinary course of business would have been the amount of the patentees' sales and profits. When the product of patented machinery is a new and special article, which cannot be successfully imitated without its use, the process of estimation is comparatively simple; but that is not the case with horse-shoe nails. The appellants had many rivals in their trade, and it is conceded that, in estimating their damage, there must be taken into account all legitimate competition to which they would have been exposed if Kollen's nails had not been in the market. I am clearly of opinion that the respondents are not entitled to assail these patents, and cannot be heard to say that

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the invention, so far as appropriated by the Kollens, was of no advantage to their manufacture. But I am unable to go the full length contended for by the appellants, and to treat the case on the footing of leaving altogether out of view the fact that, if the respondents had not sold the "Shoe" brand, they would have been in the market, as they had been previously, selling other nails. That fact appears to me to be beyond dispute, and I think that to ignore it would be tantamount to giving the appellants not compensation merely, but profits which they would never have earned if the respondents had not infringed.

Assuming that the respondents might possibly have produced nails of similar quality with the "Globe" brand, by means of machinery which did not infringe these patents, I do not think it is proved, or ought to be presumed in favour of infringers, that they would certainly have done so; and I have come to the conclusion that the sum of £530, fixed by the Lord Ordinary, fairly represents the damage sustained by the appellants. I should have been inclined to assess damages at a higher figure, had it not been for these considerations. The appellants' sales had, in the year 1882, risen to 1268 boxes per month; and yet the combined sales of both parties in 1883 and 1884, according to the most favourable estimate, did not exceed 1310 boxes monthly, notwithstanding the way in which these sales were pressed in the market, and the frequent reductions made in price. That circumstance, of itself, indicates the presence of other formidable competitors in the Scotch market, and leads me to infer that, even in the absence of competition by the respondents, the appellants' sales would not have exceeded the limit they had attained in 1882, and that their average could not have been maintained without a reduction of price. Again, it appears to me that the appellants have failed to establish that, after the respondents' illegal competition ceased, they continued to suffer from its effects. On the contrary, I think it is probable, if not proved, that after the date of the interdict they derived pecuniary benefit from the respondents' outlay and exertions in pushing the sale of their "Shoe" brand nails.

I am, accordingly, of opinion that the interlocutor of the First Division ought to be reversed, and that of the Lord Ordinary

restored; and I agree that neither party ought to have costs after the date of the Lord Ordinary's judgment.

LORD MACNAGHTEN:—

My Lords, the appellants' claim for damages comes under two heads—loss of sales and fall in prices.

The Lord Ordinary assessed the damages at £530. He arrived at that figure in this way. The total number of boxes sold by the respondents during the period of interference was 5752. From that number he struck off 700 as having been imported before the 27th of June, 1883, the date on which the appellants acquired title to their patents, and he calculated that the appellants would have realized the sum of £530 as the amount of profit on the sale of the remaining 5052 boxes, if they had sold those boxes themselves. There were two other elements which the Lord Ordinary took into consideration. On the one hand it was not certain that the appellants would have made the whole of those sales themselves. On the other the competition of the respondents might to some extent have lowered the selling price of the nails in the market. But in the result those considerations were allowed to balance each other.

On a reclaiming note the judges of the First Division reduced the damages to £50. They entered into an elaborate inquiry as to the utility of those parts of the patents which the respondents were found to have infringed. They pronounced those parts to be only subsidiary and unimportant, and so they came to the conclusion that if the interdict had been granted at an earlier date, or if the respondents had been better advised they might have been in the market with nails in all respects the same, but manufactured without the use of those parts of the patents which they had no right to use. On this ground they held the first branch of the appellants' claim untenable.

As regards the claim in respect of reduction of price, the learned judges did not reject it as being too remote, but they thought that it had not been proved that the competition of the respondents was really the cause of bringing down the price. They considered the reduction attributable in a great measure to the competition of other nail manufacturers. In the result they seem to

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have been of opinion that the appellants were only entitled to nominal damages, which, somewhat singularly, they assessed at the sum of £50, as being the measure of the advantage which the respondents gained by the infringement.

I am unable to agree with this view. The decision in the patent action and the minute of admission in the present case establish beyond question that in selling the "Shoe" brand nails, the respondents infringed the appellants' rights. The sale of each and all of those nails was unlawful. It appears to be beside the mark to say that the respondents might have arrived at the same result by lawful means, and that, without infringing the appellants' rights, they might have produced a nail which would have proved an equally dangerous rival of the "Globe" nail.

The sole question is, what was the loss sustained by the appellants by reason of the unlawful sale of the respondents' nails? The loss must be the natural and direct consequence of the respondents' acts. In the first place, I think the claim for loss of profit, by reason of the reduction of price, must be rejected. I do not think that was the natural or direct result of the respondents' acts. The appellants seem to have had no difficulty in ascertaining where the competing nails were made, and in coming to the conclusion that they were produced by machinery which infringed their patent rights. The appellants must be taken to have believed in their case. If they believed that the respondents were infringing their rights, and relied on obtaining redress in due course of law, it appears to me that it was not a reasonable course on their part to reduce the price so as to injure their own trade. On establishing their rights they would be entitled either to the profits which the respondents had made, or to the damages which they could prove they had sustained. In lowering their prices they seem to me to have been prompted by a desire to provide for the contingency of their failing in their action, and by an anxiety to drive their rivals from the field, whether they were right or wrong.

There remains the other head of damage: loss of sales by reason of the competition of the respondents.

I think the appellants are entitled to take into account the

total quantity of nails sold by the respondents and that they are not limited, as the Lord Ordinary held they were, to the period commencing on the 27th of June, 1883. Although that was the date on which the appellants acquired their title to the patents, they succeeded to the rights and to the property of their predecessors in title.

Then comes the question, to what extent did the wrongful acts of the respondents operate to prevent sales by the appellants? I think it would be going too far to say that if the respondents had not been in the field the appellants would have sold an additional quantity, equal to the amount sold by the respondents. But, considering that the respondents seem to have worked the ground occupied by the appellants, and having regard to the progressive increase in sales during the previous years, and to the fact that the sales of the appellants and of the respondents, taken together, did not largely exceed the appellants' sales in 1882, I think it is a fair inference that if the appellants had been left undisturbed the natural increase of their business would have come near the aggregate of the quantity sold by the appellants and respondents together.

If it were assumed that but for the interference of the respondents the appellants would have sold 5752 boxes, in addition to what they actually sold, their loss, taking the actual prices, would be £611. I think it would be reasonable to strike off from that amount a moderate percentage, as representing sales due to increased activity produced by the rivalry of two competitors. This would reduce the damages very much to the amount found by the Lord Ordinary, though he has arrived at the result in a somewhat different way.

The amount of damages is not a matter of exact calculation, and your Lordships have not got before you all the materials which would be required to arrive at the most accurate estimate that could be formed, nor indeed all the materials that were before the Lord Ordinary. But it appears to me that substantial justice will be done if your Lordships confirm the amount that the Lord Ordinary has awarded. It would be lamentable to condemn the parties to further litigation.

As regards costs, it seems to me that the respondents ought to

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pay the costs of the trial before the Lord Ordinary, but that there ought to be no costs of the subsequent proceedings.

The interlocutor appealed from reversed, and the judgment of the Lord Ordinary restored: respondents to pay the costs of the trial before the Lord Ordinary; but neither party to have their costs in the subsequent proceedings.

Lords' Journals, 26 March, 1888.

Agents for the appellants: *Slade & Munk, for Gill & Pringle, W.S., Edinburgh.*

Agent for respondents: *W. A. Loch, for Maconochie & Hare, W.S., Edinburgh.*

[IN THE HOUSE OF LORDS.]

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RUSSELL . . . . . APPELLANT;

AND

TOWN AND COUNTY BANK, LIMITED . RESPONDENTS.

Revenue—Income Tax—Deductions from Profits—Part of Bank Premises used as Dwelling-house by Manager—5 & 6 Vict. c. 35, s. 100, Sched. D., rules 1 of Cases I. and II.

By 5 & 6 Vict. c. 35, s. 100, first rule, first case, the duties under schedule D in respect of any trade are to be charged on a sum not less than the full amount of the balance of the profits of the trade "without other deduction than is hereinafter allowed;" and by the first rule applicable to the first and second cases in reference to such duties, no deduction shall be allowed for "any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade," &c., "nor for the rent or value of any dwelling-house, &c., except such part thereof as may be used for the purposes of such trade or concern not exceeding the proportion of the said rent or value hereinafter mentioned."

The respondents, a banking company, carried on their business in buildings which contained accommodation occupied as a dwelling-house by the manager or resident agent:—

Held, affirming the judgment of the Court of Session as the Court of Exchequer, Scotland (14 Court Sess. Cas., 4th Series, 528), that the respondents were entitled to deduct from their profits before returning them for assessment under Schedule D the annual value of the whole bank premises, including the part occupied by the manager.

APPEAL from the First Division of the Court of Session as the Court of Exchequer, Scotland (1). The question arose upon a

(1) 14 Court Sess. Cas. 4th Series, 528.

case stated by the Income Tax Commissioners, the material facts of which are as follows:—The respondents, an incorporated company carrying on business in various banking buildings in Aberdeen, which are their own property, appealed against an assessment under Schedule D of the Income Tax Acts made on the bank for the year 1885. The following facts are admitted:—(1) That the whole premises, both in Aberdeen and elsewhere, in which the banking company carry on business, are their property, and that they pay income tax on these premises under Schedule A; (2) That the premises used as the head offices of the bank in Aberdeen, and in the same way the premises used as branch offices of the bank, contain certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank, as the case may be. The manager and agent receive such accommodation as part of their emoluments in the service of the bank, but the annual value of this accommodation is not assessed to income tax otherwise than under Schedule A; (3) That the sum in question (£1058) is the aggregate annual value of the portion of these premises occupied by the officials or agents of the bank as their dwelling-houses; (4) That this sum, like the other sums, on which tax has already been paid, had been deducted from the bank's profits before these were returned to the Income Tax Commissioners for assessment under Schedule D; (5.) That the sum in question did not include any portion of the premises belonging to the bank used solely as counting-houses; but that deduction had also been made, and not objected to, from the bank's profits of the aggregate annual value of the portions of the bank's premises so used; (6.) That taking the premises belonging to the bank in Aberdeen and elsewhere as a whole, the aggregate value of the portions used as counting-houses and allowed as a deduction does not exceed two-thirds of the value of the whole.

The respondents "contended that in the return submitted by them deduction had been properly made from the bank's profits of the sum representing the annual value of its premises occupied by its officials or agents as their dwelling-houses."

By 5 & 6 Vict. c. 35, s. 100, Sched. (D):—

"The duties hereby granted, contained in the schedule marked

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(D) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment."

Rules: "The said last-mentioned duties shall extend to every description of property or profit which shall not be contained in either of the said schedules (A) (B) or (C) and to every description of employment of profit not contained in schedule (E), and not specially exempted from the said respective duties.

"And shall be charged annually on and paid by the persons, bodies politic or corporate, fraternities, fellowships, companies or societies, whether corporate or not corporate, receiving or entitled unto the same, their executors, administrators, successors and assigns respectively."

Rules for ascertaining the last mentioned duties in the particular cases herein mentioned.

First case—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act.

Rules: 1st.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade . . . and shall be assessed, charged, and paid without other deduction than is hereinafter allowed.

First and second cases:

Rules applying to both the above cases:—

1st.—In estimating the balance of profits or gains to be charged according to either of the first or second cases no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains for—

Any disbursement, or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure or concern or of such profession, employment, or vocation.

Nor for any disbursements, or expenses of maintenance of the parties, their families or establishments.

Nor for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices

except such part thereof as may be used for the purposes of such trade or concern, not exceeding the proportion of the said rent or value hereinafter mentioned [that is two-thirds by sect. 101].

Nor for any sum expended in any other domestic or private purpose, distinct from the purposes of such trade, manufacture, adventure or concern, or of such profession, employment or vocation.

The Commissioners having decided against the deduction claimed by the respondents, the First Division of the Court of session as the Court of Exchequer in Scotland, pronounced an interlocutor on the 4th of March, 1887, by which they reversed the decision of the Commissioners, and remitted the case back to them, to allow the deduction claimed by the respondents, with expenses.

On appeal,

April 26. *Sir R. Webster, A.G.*, and *The Solicitor for Scotland* (*J. P. B. Robertson*, Q.C.), (with them *The Lord Advocate* (*McDonald*, Q.C.) and *Mure*) for the Crown :—

The judgment appealed from is wrong. The first rule applicable to cases i. and ii., paragraph 4 (5 & 6 Vict. c. 35, sect. 100 ; Dowell, 109), treats of dwelling-houses as something part of which may be and is in fact used for business purposes, and part of which is used for its primary and natural purpose of a dwelling-house. But the Act prohibits any deduction for the rent or annual value of any dwelling-house, except to a certain extent and in a certain case. A tradesman who lives over his shop can only deduct the rent of that part of his premises used for his shop ; and it being clear that corporate bodies are included in the Act—see second rule, case i. Dowell, 107—there ought to be no distinction between a tradesman and a body corporate whose occupation is by their manager.

[LORD HERSCHELL :—Suppose the bank paid a rent of £50 for a person in their employment, it being necessary for their business to have him there, would they be entitled to deduct that rent as part of their expenses ?]

That is not the same case as the present—the statute deals

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specifically with a dwelling-house which is in fact occupied by a trader, which is the case here.

The legislature contemplated that if the house was under ordinary circumstances a building which might be used as a dwelling-house, then the residential part was not to be considered as being a charge upon the business, although it might indirectly affect the profits.

The view of the Court below, that the manager can be taxed under Schedule E on the ground that the house occupied by him is a perquisite or profit belonging to his office, cannot be supported. Cases 5 and 6, Schedule E., Dowell, 157, shew that a dwelling-house rent-free cannot fall under the words "perquisite," for the conception is a money payment.

Sir *Horace Davey*, Q.C., and *A. Graham Murray* (of the Scotch Bar), for the respondents:—

The only question is, whether the rent which is paid, or the annual value of that portion of the premises occupied by the bank manager as his residence, is a disbursement wholly and exclusively made for the purposes of the trade, manufacture, or business. The bank finds it expedient to have a responsible person residing day and night for the purpose of safety or otherwise on the bank premises. To that extent the bank may use the premises as a dwelling-house, but the primary purpose and the only one for which they are used is strictly and literally a disbursement exclusively laid out and expended for the purpose of their trade, and therefore they must be entitled to deduct the whole annual value of that building from their balance of profits. The Act is complicated, and no deduction is expressly authorized; but you are told what you are not to deduct, and it is only by the exception in the negative clause that you find what you are to deduct. Paragraphs 3 and 4 of the first rule applicable to cases i. and ii., Dowell 109, shew that the exception there refers to tradesmen themselves; because obviously where a shopkeeper takes a house and employs the ground-floor as his shop and dwells in the upper floor, the residential part is no part of his trade disbursements. In Dublin and Edinburgh it is common for barristers to use a portion of their residence for professional purposes: so

also medical practitioners in the country use a portion of their residence as a surgery. These are the cases contemplated. It is said that in some private banks the junior partner has the right to live in the bank, but that is an addition to his profits, and if the bank deduct that before making the return the firm ought to be charged income tax on it, because the proportionate rent of the house so occupied is actually a part of the profits derived from carrying on the business. But suppose a sum of £100 is paid to a salaried manager who is not a partner and who does not participate in the profits, that is a disbursement necessary for earning the amount of the profits. The appellant's argument must go to this extent, that if a single room in the bank premises is used as the residence of a caretaker or of a watchman the bank cannot deduct more than two-thirds. But that is not the meaning of the enactment. The meaning is that if any part of the premises is used for a domestic purpose wholly unconnected with the business then you are not entitled to deduct the whole of the rent. Here the value of the manager's residence is a disbursement for the purpose of the business just as much as the salary which is paid to him, and just as much as if his salary were increased by the additional sum of £50 a year with which to find himself a residence. If the manager's salary or emolument is increased to the extent of the rent of this house then the Crown is entitled to have their income tax, but if it is not an emolument of the manager although it is a disbursement by the bank, then the Crown should not get income tax on it at all. *Coltness Iron Company* v. *Black* (1) is a very different case.

The Solicitor General for Scotland in reply.

LORD HERSCHELL :—

My Lords, this is an appeal from a judgment of the First Division of the Court of Session sitting as the Court of Exchequer in Scotland, reversing the decision of the Income Tax Commissioners with reference to the liability of the respondents to pay a certain amount of income tax claimed. The facts are

(1) 6 App. Cas. 315.

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very shortly stated. The respondents are an incorporated company carrying on the business of banking, and they own certain premises which they use for their business purposes, and those premises (to quote the language of the case) "contain certain accommodation occupied as a dwelling-house by the manager and resident agent of the bank." The respondents claim to deduct the entire annual value of the bank premises, including the portion so occupied by the manager or resident agent. The Crown, on the other hand, contend that the portion of the premises occupied for that purpose ought to be dealt with separately from what they term the bank premises proper, and that no deduction ought to be allowed in respect of the annual value of that portion of the premises belonging to the respondents.

My Lords, the question turns upon the construction to be put upon the 100th section of the Income Tax Act of 5 & 6 Vict. c. 35. The case is a case under Schedule D, and to be dealt with according to the rules provided in relation to that schedule. It is asserted on behalf of the appellant that the rules prohibit all deductions except those which are expressly authorized by the Act, and that this deduction not being a deduction allowed, the respondents are not entitled to insist upon it.

The duty is to be charged upon "a sum not less than the full amount of the balance of the profits or gains of the trade manufacture, adventure, or concern;" and it appears to me that that language implies that for the purpose of arriving at the balance of profits all that expenditure which is necessary for the purpose of earning the receipts must be deducted, otherwise you do not arrive at the balance of profits, indeed, you do not ascertain, and cannot ascertain, whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word "profits" in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name "profits" can properly be applied.

My Lords, it is quite true that the section provides that "the duty shall be assessed, charged and paid without other deduction

than is hereinafter allowed;" and I will assume, for the purposes of this case, that that does prohibit (although the words certainly appear to be applicable to the duty) the making of any deductions from the balance except those allowed by the subsequent provisions of the Act. It is to be observed that, properly speaking, there is nothing to which those words are applicable. The provisions of the Act do not expressly allow any deductions. What they do is to prohibit certain deductions with certain exceptions, and therefore it may perhaps, in a sense, be said that having prohibited certain deductions with certain exceptions, the excepted things are allowed.

Now it is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am, of course, speaking, for the moment, of premises which are not used in any way as a place of dwelling, but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed because it is an essential element to be taken into account in ascertaining the amount of the balance of profits. If not it can only be included by a very broad extension of the terms actually used, as being a disbursement or expense which is money wholly and exclusively laid out or expended for the purposes of the trade. It is quite true that, strictly speaking, the annual value where the premises are owned and not rented, is not money laid out or expended for the purposes of the trade, but it is admitted, and must, I think, have been admitted, that in either the one way or the other that deduction is to be made, because inasmuch as it is clear that even in the case of a dwelling-house a part of which is used for purposes wholly unconnected with the trade, the annual value of the portion which is used for the purposes of the trade is to be deducted, it is evident that it can never be contended that in the case of premises used not for the purpose of a dwelling at all but exclusively for trade purposes, the annual value is not to be deducted. The annual value is, therefore, to be deducted somehow. It is to be deducted either by taking it as an element before arriving at the balance of profits and gains, or

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as included in a very broad construction of the provision relating to disbursements and expenses.

If therefore the whole of these bank premises had been used for the business purposes of the bank without any one dwelling in them, it is quite clear that the entire annual value would have fallen to be deducted. But it is said that inasmuch as the manager of the bank dwells in a part of those premises that deduction is not to be made. Now, apart from the provision with regard to a dwelling-house, to which I will advert in a moment, I cannot see any foundation for such a contention. The portion of the bank in which the manager resides is as much used for the purposes of the business of the bank, so far as appears upon the facts stated in this case, as if it were used in any other way. He resides there for the purposes of the bank—the bank receive nothing for his residing there. The bank are in precisely the same position as if that portion of their bank premises were used in any other way in the strictest sense for the purposes of the bank and the business of the bank. Therefore I do not see any reason why, if the annual value of the premises belonging to them used for the purposes of their business has to be deducted, any deduction should be made from that amount on account of the fact that the manager of the bank for the purposes of the business or as part of his emolument (it seems to me not to matter which) occupies a portion of the bank premises.

But then it is said that the case of dwelling-houses is specially dealt with, and that no deduction is to be made in the case of dwelling-houses except in the manner specified. Now, my Lords, it is to be observed that that provision follows the general provision to which I have already alluded, and I think it would be extremely difficult to contend (though the learned counsel who appeared for the appellant hesitated to admit this) that if the bank paid as part of his emoluments the rent of a house in which their manager lived that would not be strictly speaking a disbursement or expense wholly and exclusively laid out or expended for the purpose of their business. Well, but if so, it is impossible to contend, or very difficult at least to contend, that an expense of that sort which comes within those terms, and which under those terms might be deducted, is rendered illegitimate as a

matter of deduction by the words which follow. Now the words immediately following are—"nor for any disbursements or expenses of maintenance of the parties, their families, or establishments," which, of course, are not proper deductions in ascertaining the balance of profits of a trade or calling. Then follow the words: "nor for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern." I think that that manifestly is intended to apply to the case where a dwelling-house is occupied or rented by the person assessed in part for business purposes and in part for purposes which are other than business purposes. In that case the legislature has provided that a portion of the rent to be determined by the commissioners, and that portion alone, is to be deducted from the profits of the business. That this is what is being dealt with seems to me to be clear from the clause which follows: "nor for any sum expended in any other domestic or private purposes distinct from the purposes of such trade manufacture," and so on. That shews that what the legislature were dealing with at that time and intended to refer to were disbursements for the expense of maintenance, or the expense of residence, or any other domestic or private purpose; and if that be the true view it would be wholly inapplicable to expenditure by a trader upon house rent for the purpose of housing his servants where such accommodation was necessary or incidental to the carrying on of his business.

It is contended on behalf of the appellant that the whole of this building is a dwelling-house. My Lords, I cannot agree in that conclusion. I do not think that the word "dwelling-house" is here used in any such sense, and that a bank or a manufactory or a warehouse becomes a dwelling-house because some servant of the trader resides in that building for the purposes of the trade.

My Lords, it is unnecessary to decide whether the bank manager would be liable to income tax in respect of the value of his residence as part of the emoluments of his employment. I may say, however, that it occurs to me that the liability, if it exists, is not under Schedule E, but under Schedule D, case 2, which

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appears to be the one applicable to such an employment as that of a bank manager; and under that schedule the duty is to be computed upon "the full amount of the balance of the profits, gains, and emoluments of such profession."

A great part of the argument for the Crown has turned upon the suggestion that if the bank are allowed to make this deduction no claim can be made in respect of the enjoyment of this property by the bank manager. It does not follow necessarily that the Crown must be entitled to make any such charge. If it is not to be regarded as an emolument of the bank manager, but as a burden laid upon him by the necessities of his employment, no doubt it may be that he is not liable. If, on the other hand, it is to be regarded as an emolument the statute seems in express terms to make him liable. Of course it is not necessary in the present case nor would it be proper in his absence to express any definite opinion as to whether he would be so liable or not, but it is sufficient, I think, to say that the deduction which is proposed to be made appears to be one which is essential to arriving justly and truly at the balance of profits and gains of this business, and that therefore the judgment of the Court below ought to be affirmed.

LORD FITZGERALD :—

My Lords, I entirely concur with what has fallen from my noble and learned friend, and I think that the judgment should be affirmed. There is always considerable difficulty in putting a clear construction on the provisions either of the Act of 1842 or of the Act of 1853—the schedules to which Acts must be looked to. But I think we have a clear state of facts here (save in one particular to which I shall advert presently) which enables us to come to a just conclusion.

We find that a certain portion of the bank premises is "occupied as a dwelling-house by the manager or resident agent of the bank, as the case may be. The said manager and agent receive said accommodation as part of their emolument in the service of the bank, but the annual value of this accommodation is not assessed to income tax otherwise than under Schedule A." Then it is stated "that these dwelling-houses form the official

residences of the agents, and are necessary for the proper carrying on of the business of the bank; that owing to the nature of the bank's business it is essential that a responsible official should reside on the bank premises, and that thus the whole premises belonging to and occupied by the bank or its officials or agents are used for the purposes of the bank's business. There is no necessity and no possibility for the bank, as such, having a dwelling-house merely for occupation. The whole premises are, for the purposes of the bank, business premises."

Now although that is only a contention put forward, yet it is a contention put forward without any controversy as to the facts, but I venture to say that I am not satisfied as to one of the propositions. All through the statement these are called "dwelling-houses." They are in fact a portion of the bank premises occupied, for the purposes of the bank's business, by a bank manager or a bank clerk. With all respect I should say that it does not follow that they are dwelling-houses at all, or that the occupation of certain rooms in the bank by the bank manager for bank purposes, which occupation is necessary for the protection of the institution and the carrying on of its business, converts that part of the bank premises into a dwelling-house, though it may make them for certain purposes the dwelling of the manager or clerk.

However, passing from that, the first thing which we have to ascertain under this schedule is to estimate the balance of the profits. Now what is the balance of the profits? "Profits" I read on authority to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them—that is, what is gained by the trade. The whole expenses of earning them must mean, according to the schedule, the whole expenses incurred for the purposes of the business and nothing else. But I come, upon the statement of facts, to the conclusion that if these premises were either actually used as the counting-house, as other parts of the bank were used, or if the residence of the bank manager or clerk upon the premises was necessary for protection purposes and for the purposes of carrying on the business of the bank, the whole premises were used for the purposes of the business of the bank and the annual value of them forms a

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proper deduction in estimating the balance of profits, which is the first thing to be done. That balance of profits is to be ascertained after deducting the whole of the necessary expenses save those which by negative provisions are excepted in the statute.

My Lords, without going further, it appears to me to be perfectly immaterial whether this accommodation is to be regarded as a part of the emolument of the manager of the bank for the performance of the duties imposed upon him or as a part of the premises used solely and wholly for bank purposes. Upon the ground which I have stated it seems to me clear that this deduction is a deduction which the bank are entitled to make, and that, therefore, they have already paid the whole amount of income tax for which they are liable.

LORD MACNAGHTEN :—

My Lords, I quite agree; I think that the deduction was properly and necessarily made in estimating the profits and gains of the bank which were chargeable with duty, and that there is nothing in the first rule applicable to the first and second cases under Schedule D prohibiting the deduction. I do not think that a house in which a bank or limited company carries on business is a dwelling-house within the meaning of that rule. It is not and could not be used by the bank for any purpose distinct from their business. I think the expression "dwelling-house" in that rule means a house in which the person liable to pay income tax dwells in the ordinary sense of the word.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journal, 26th April, 1888.

Agent for the appellant: *W. H. Melvill, Solicitor for England of the Board of Inland Revenue; for David Crole, Solicitor for Scotland of the Board of Inland Revenue, Edinburgh.*

Agents for the respondents: *Grahames, Currey, & Spens, for J. & F. Anderson, W. S., Edinburgh.*

[PRIVY COUNCIL.]

ELLEN ABD-UL-MESSIH (Widow) . . . Plaintiff; J. C.*
1887
AND
CHUKRI FARRA and ANGELA FARRA . Defendants. *Dec.* 19, 20, 21, 22.

In re The Estate of ANTOUN YOUSSEF ABD-UL-MESSIH. 1888 *March* 17

ON APPEAL FROM THE SUPREME CONSULAR COURT OF CONSTANTINOPLE.

Law of Personal Status—Power of Testacy—Distribution—Turkish Domicil—British protected Subject—Chaldean Catholics.

The testator, a member of the Chaldean Catholic community, having a Turkish domicil of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject:—

Held, that he died domiciled in the dominions of the Porte, and that the Consular Court at Constantinople, being bound by sects. 5 and 6 of the Order in Council of 1873 to follow the same principles which would have been observed by an English Court of Probate, was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of the deceased and in distributing his effects.

There is no such thing as domicil arising from society and not from connection with a locality; consequently, as Cairo was not a British possession governed by English law, the testator's permanent abode therein under British protection did not attract to him an English or Anglo-Egyptian domicil.

In re *Tootal's Trusts* (23 Ch. D. 532) approved.

APPEAL from an order of the Supreme Consular Court (May 28, 1886), by which it was ordered that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in the Ottoman dominions, should be followed in distributing the effects of Antoun Youssef Abd-ul-Messih, deceased.

The facts are stated in the judgment of their Lordships. The order was made on a petition presented by the appellant as executor and residuary legatee under her husband's will on the 27th of October, 1885, for probate thereof.

* *Present:*—Lord Watson, Lord Hobhouse, Sir Barnes Peacock, and Sir James Hannen.

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The respondents (nephew and sister to the deceased) obtained an order from the Court giving them leave to plead, among others, a plea to the jurisdiction of the Court on the ground that the deceased being an Ottoman subject, born at Bagdad, within the Ottoman dominions, and having died at Cairo, also within the Ottoman dominions, the Court had no jurisdiction over the deceased, nor any jurisdiction over his estate at Cairo.

The Court on the 24th of February, 1886, decreed—

That the deceased having acquired the status of a protected British subject, this Court has jurisdiction over the succession of the above-named deceased;

and further decreed—

That the question as to what law the Court will follow in distributing the effects of the above-named deceased may be raised by future argument.

This judgment was not appealed from and was final.

On the 28th of May, 1886, the Court ordered as above.

Lumley Smith, Q.C., and *Jeune* (*Hood*, *Safford*, and *Challis*, with them), for the appellant, contended that the order of the 28th of May, 1886, should be discharged; and that the suit should be remitted to the Court below with a declaration that the law to be followed in determining both the deceased's power of testacy at the date of the will, and also the validity of the will, was the statute and other law for the time being in force in and for England. First, it was contended that the effect of the Foreign Jurisdiction Acts and the Order of Her Majesty in Council of the 12th of December, 1873, was to provide that the above was the positive law applicable to the deceased, and to govern the succession to his estate. Evidence was read to shew that the deceased had always been recognised as a British subject. The previous judgment, not appealed from, of the 24th of February, 1886, had decided that the testator had acquired the status of a protected British subject, and that the Consular Court had jurisdiction over his succession. No distinction can be drawn between British subjects and the protected persons who by treaty form, as it were, a privileged society enjoying immunity from territorial rule and taxation, and amenable only to the British Consular Courts in

matters civil and criminal. The order, therefore, of the 24th of February, 1886, decided by implication that the law to be followed in deciding the deceased's testamentary capacity and in administering his estate is the statute law for the time being in force in and for England. The respondents not having appealed were estopped from contending to the contrary; the principle contended for by the appellant is res judicata in his favour. By that law the testator acquired under treaties, capitulations, Acts of Parliament and Orders in Council, and the laws in force in the Ottoman dominions, including Egypt, the right of making in Turkey a will in the same manner as British subjects or other persons under Her Majesty's jurisdiction in that country. Reference was made to Hertslet's Treaties, vol. ii., p. 375 (a treaty of the 5th of January, 1809, arts. 9, 10). For distinction between temporary and permanent protégés, see Réglement of August, 1863, regarding foreign consulates, 15 Hertslet, 1064; the Foreign Jurisdiction Act (6 & 7 Vict. c. 94); Colonial Law Validity Act, 1865 (28 & 29 Vict. c. 63); Foreign Jurisdiction Act, 1878 (41 & 42 Vict. c. 67); and the Order in Council of 1873, sects. 5, 6, 91. And according to the municipal law of Turkey a Turkish judge would distribute the effects of the deceased, who had denationalised himself according to the law of the country of his adoption. Reference was made to the law on Ottoman Nationality (6 Chawal, 1285—19 January, 1869), and a circular of the 26th of March, 1869, addressed by the Ottoman Government to the governors-general of the villayets of the empire, and to Codes Egyptiens, pp. 5, 10, 26, and 37; also to *Maltass* v. *Maltass* (1); *Collier* v. *Rivaz* (2); *In the Goods of La Croix* (3). Besides being a British protected subject under treaty the testator had acquired under special principles of law an English domicil. He was affiliated to the community of persons under English jurisdiction at Cairo, who formed as it were an ex-territorial colony of the Crown. In Eastern, and especially Mahomedan, countries where the circumstances are very dissimilar from what they are in foreign Western or Christian states, subjection to the jurisdiction of the Consular Courts is equivalent to residence in the

(1) 1 Rob. Ecc. Cas. 67. (2) 2 Curteis, 855.
(3) 2 P. D. 94.

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country to which those Courts belong, so as to establish domicil in that country. Reference was made to *Whicker* v. *Hume* (1); *Udny* v. *Udny* (2); *The Indian Chief* (3); Westlake's Private International Law, pp. 262, 266; Wheaton's International Law (Boyd), 2nd ed., p. 395; *Freke* v. *Lord Carbery* (4); *In re Tootal's Trusts* (5); Féraud Girand, Jurisdiction française, vol. ii., pp. 58, 78, 80, legal condition of foreigners in Turkey; Williams on Executors, p. 373. See also Order in Council, 1873, sects. 206, 222, and 229, which shew that the laws of England have been carried into Constantinople and are applicable to all beneath the jurisdiction of the British Consular Courts.

Sir *Horace Davey*, Q.C., and *Seward Brice*, Q.C. (*A. Mattei*, with them), for the respondents, contended that the judgment appealed from was correct. The evidence shewed that the testator was born of Ottoman parents in Bagdad, in the Ottoman empire, and therefore had a domicil of origin in Bagdad. Though he went to India there is no evidence of any intention to abandon his domicil of origin or to acquire a new domicil in India. If he had acquired a new domicil, then on his finally leaving India his domicil of origin revived. He died at Cairo with an Ottoman domicil, unless it can be shewn that he had acquired a different one. The Order in Council of 1873 did not give him a new domicil. Her Majesty in Council had no power, even under the Foreign Jurisdiction Act of 1843, to legislate with regard to the personal status of her subjects, whether by birth, by naturalization, or by protection. A protected person (see interpretation clause, sect. 4) is placed in sharp contrast to a subject in the full sense of the term. Registration of any individual as a protected person has no other effect on the personal status of such person than to subject him to and give him the benefit of the jurisdiction of Her Majesty's Consular Courts. Sect. 6 shews what law is to be applied to protected persons, viz., English law, and by that law personal status and testamentary capacity are to be governed by the law of the domicil of origin, unless a new domicil has been acquired (see

(1) 7 H. L. C. 160.
(2) Law Rep. 1 H. L., Sc., 441.
(3) 3 Rob. Adm. 26.
(4) Law Rep. 16 Eq. 466.
(5) 23 Ch. D. 532.

sects. 46 and 91). English law means the law which the English Courts would have applied to the testator in his proved circumstances, and that is the law of his domicil, the same law which would have been applied had he lived in England domiciled in Turkey. The order does not introduce and apply to the testator English law as applicable to persons domiciled in England.

Reference was made to Lord Selborne's judgment in *Ewing* v. *Orr Ewing* (1); *Whicker* v. *Hume* (2); *De Mora* v. *Concha* (3); *Thornton* v. *Curling* (4). It is not English law that every person of whatever domicil should have his movables distributed by the English Statute of Distributions. Then with regard to the point, that subjection to consular jurisdiction is equivalent to residence in the territory for the purposes of establishing domicil, no authority has been cited for it, and it leaves out of sight the principle that domicil is not an affair merely of residence, but of the legal inference properly derivable from residence. Domicil is a relation created by law between a man and a particular country. You cannot impute to a man a residence which is contrary to the fact, in order to draw a legal inference therefrom: see *Bell* v. *Kennedy* (5), and particularly the judgment of Mr. Justice *Chitty* in *In re Tootal's Trusts* (6). Reference was also made to *Jopp* v. *Wood* (7); *Bruce* v. *Bruce* (8); and to a well-known passage in Lord *Cranworth's* judgment in *Enohin* v. *Wylie* (9); *Udny* v. *Udny* (10). No doubt a man does not readily acquire domicil in a country where the religion, habits, &c., are such that an intention is not readily imputed to a man of intending to adopt them. But the Turkish domicil in this case was a domicil of origin, and therefore any argument of incongruity arising from the testator being a Chaldean Christian does not arise. The position, therefore, of the testator was this, that whether he is treated as a subject of the Queen or as a subject of the Ottoman Porte under protection he gains the benefit of the jurisdiction of the Consular Courts. But his personal status is not affected, that remains just what it

(1) 10 App. Cas. 453, 502.
(2) 7 H. L. C. 160.
(3) 29 Ch. D. 268, 303; S. C. 11 App. Cas. 541.
(4) 8 Sim. 310.
(5) Law Rep. 1 H. L., Sc., 307.
(6) 23 Ch. D. 532.
(7) 34 Beav. 88.
(8) 2 B. & P. 229, note.
(9) 10 H. L. C. 19.
(10) Law Rep. 1 H. L., Sc. 441.

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was before he was registered as a protected person. The other side contend that that registration is equivalent to naturalization, and also that recourse should be had to what the Turkish law says on the subject. It was contended for the respondents that nationality was not to be derived from Turkish law but from the Order in Council, and that in any event the evidence which had been given of Turkish law had so hopelessly mixed up nationality and protection, and had so failed to distinguish as to domicil, that no light could be derived from it. The law applicable to the testator was the Ottoman law, and his enjoyment of British protection had never purported to alter it; nor would it be altered, even if the testator had become under the treaties and Ottoman law a British subject in the full sense of the term.

Lumley Smith, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON:—

The appellant, in October, 1885, instituted the present suit, before Her Majesty's Supreme Consular Court at Constantinople, for probate of the will of her husband Antoun Youssef Abd-ul-Messih, who died at Cairo in February, 1885, leaving a large personal estate. Her application was opposed on its merits by the respondents, two of the next of kin of the deceased, who also pleaded that the Court had no jurisdiction. The judge of the Consular Court, by a decree of the 24th of February, 1886, sustained his own jurisdiction, in respect of "the deceased having acquired the status of a protected British subject;" and in that finding both parties have acquiesced. Issues were then adjusted, the first being,—"Is English law to be followed in distributing the assets?" and the second,—"If the Court is of opinion that English law is not applicable, is Turkish, or what other law?" Evidence, both oral and documentary, bearing upon these issues was adduced; and thereafter, on the 28th of May, 1886, the learned judge pronounced the order now appealed from, whereby he found that the testator "died domiciled in the Ottoman Empire, his domicil of origin, and a member of the Chaldean Catholic community;" and in respect of these findings, decreed

"that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of the said deceased and in distributing the deceased's effects."

It is therefore res judicata that the Consular Court has jurisdiction to entertain the present suit, and to administer the estate of the deceased, in accordance with the provisions of Her Majesty's Order in Council, dated the 12th of December, 1873. Sect. 5 of the Order enacts that Her Majesty's civil jurisdiction in the Ottoman dominions shall be exercised under and according to the provisions of the Order, "and not otherwise;" and sect. 6 prescribes that (subject to the other provisions of the Order) the civil jurisdiction thereby established shall, as far as circumstances admit, "be exercised on the principles of and in conformity with the common law, the doctrines of equity, the statute law, and other law for the time being in force in and for England." By sect. 91 it is enacted that the Supreme Consular Court at Constantinople shall be a Court of Probate, and shall, as far as circumstances admit, have "for and within the Ottoman dominions, with respect to the property of deceased resident subjects or protected persons, all such jurisdiction as for the time being belongs to Her Majesty's Court of Probate in England." According to the interpretation clause (sect. 4) the word "subject" means a subject of Her Majesty by birth or by naturalization; and the expression "a protected person" means a person enjoying Her Majesty's protection. These are the only classes of persons whose estates, on their decease, are made subject to the probate jurisdiction of the Consular Court.

Having regard to the enactments of sections 5 and 6 of the Order, their Lordships are of opinion that it was the duty of the Consular Court to follow, in the present case, the same principles which would have been observed by an English Court of Probate. It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends, not upon nationality, but upon domicil alone; and, consequently, that the law of the testator's domicil must govern in all questions arising as to his testacy or intestacy, or as to the rights of persons who claim his succession ab intestato. That doctrine was clearly explained

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by Lord Cranworth in *Enohin* v. *Wylie* (1). Accordingly, the tribunal in which the estate of a deceased is to be administered, if it be not itself the forum of the domicil, must defer on all these points to the law of the domicil, and accept that law as its only guide.

The late Antoun Youssef Abd-ul-Messih, who was born at Bagdad of Ottoman parents resident there, went in early life to India, where he remained for a considerable period, and then transferred his abode to Jeddah, in the dominions of the Porte. In the year 1858 he left Jeddah for Cairo, where he continued to reside until the time of his death, and he does not appear to have entertained any intention of changing his residence. During the whole period of his stay in Cairo he was de facto under the protection of the British Government. In 1876 he was married to the appellant, the ceremony being performed in the manner prescribed by 12 & 13 Vict. c. 68, which was enacted for the purpose of affording facilities for the marriages of Her Majesty's subjects resident abroad. On the 9th of June, 1882, he executed in English form the will now sought to be admitted to probate, by which he constituted the appellant his residuary legatee and representative. These are the whole facts in evidence which have any material bearing upon the question of domicil; and (apart from the fact of his having enjoyed British protection in Cairo) they establish, beyond doubt, that the testator, at the time of his death, had his domicil in the dominions of the Porte. If he did gain a domicil in India (of which there is no satisfactory proof), he ceased to retain it when he left that country for Jeddah without the intention of returning. His domicil of origin then revived and continued to adhere to him until the acquisition of a new domicil.

It was argued for the appellant that her husband's selection of a permanent abode, in Cairo, under British protection, attracted to him an English, or, as it was termed, an Anglo-Egyptian domicil. That result would, doubtless, have followed if Cairo had been a British possession governed by English law; but Cairo is in no sense British soil; it is the possession of a foreign Government, and subject to the sovereignty of the Porte.

(1) 10 H. L. C. 19.

Certain privileges have been conceded by treaty to residents in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. They are amenable only to the jurisdiction of our Consular Courts in matters civil and criminal; and they enjoy immunity from territorial rule and taxation. They constitute a privileged society, living under English law, on Egyptian soil, and independent of Egyptian Courts and tax-gatherers. The appellant maintained that a community of that description ought, for all purposes of domicil, to be regarded as an exterritorial colony of the Crown; and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain, where English law prevails.

The idea of a domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcileable with any of the numerous definitions of domicil to be found in the books. In most, if not all of these, from the Roman Code (10, 39, 7) to Story's Conflict (§ 41), domicil is defined as a locality—as the place where a man has his principal establishment and true home. Probably Lord Westbury was more precisely accurate, when he stated, in *Bell* v. *Kennedy* (1), that domicil is not mere residence, "it is the relation which the law creates between an individual and a particular locality or country." The same learned Lord, in *Udny* v. *Udny* (2), speaking of the acquisition of a residential domicil, said: "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend. But the law which thus regulates his personal status must be that of the governing power in whose dominions he resides; and residence in a foreign country, without

(1) Law Rep. 1 H. L., Sc., 320. (2) Law Rep. 1 H. L., Sc. 458.

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subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil.

No authority was cited which gives the least support to the appellant's contention, except perhaps a single passage in Mr. Westlake's Treatise (2nd ed., p. 262), in which the learned author mentions "Anglo-Indian, or Anglo-Turkish domicil" as affording apt illustrations of the principle that "in the East every person is a member of that civil society existing in the country in which he is domiciled which his race, political nationality, or religion determine." If by "Anglo-Turkish" the same kind of domicil is meant as that which the appellant seeks to establish, it has no analogy whatever to an "Anglo-Indian" domicil. The latter is altogether independent of political status; it arises from residence in India, and has always been held to carry with it the territorial law of that country, whether under the empire of the Queen, or under the previous rule of the East India Company, which the Courts of England treated (in questions of domicil) as an independent government. By the law established in India, the members of certain castes and creeds are, in many important respects, governed by their own peculiar rules and customs, so that an Indian domicil of succession may involve the application of Hindu or Mahomedan law; but these rules and customs are an integral part of the municipal law administered by the territorial tribunals. The legal condition of foreigners resident in Turkey, who are exempted by treaty from the jurisdiction of its local Courts, is very well described by Feraud Girand (Jurisdiction française, vol. ii. p. 58), one of the authorities referred to by the appellant's counsel. They form, according to the view of that learned writer, an anomalous ex-territorial colony of persons of different nationalities, having unity in relation to the Turkish Government, but altogether devoid of such unity when examined by itself; the consequence being that its members continue to preserve their nationality, and their civil and political rights, just as if they had never ceased to have their residence and domicil in their own country. But it is needless to pursue this topic farther. Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as

domicil arising from society, and not from connection with a locality. *In re Tootal's Trusts* (1) is an authority directly in point; and their Lordships entirely concur in the reasoning by which Mr. Justice Chitty supported his decision in that case.

It was next argued that the order not only permits subjects and protected persons, who at the time of their decease are resident in the Ottoman dominions, to test according to English law, but prescribes that they shall make their wills in English form, and in no other. It was represented to be the effect of the order that, in the case of such persons, English law is the sole criterion by which their capacity to make a will, and its validity when made, must be determined. If that were the true construction of the order it might lead to very singular consequences. All that is required, in order to give complete probate jurisdiction to the Consular Court, is that the testator shall have been resident in the Ottoman dominions at the time of his decease; it is not requisite that he should have had his only or his principal residence there. If a Scotchman went to reside in Egypt for the purposes of his business, leaving his family at home, and happened to die there, his testament, sufficiently executed according to the law of Scotland, might be invalided by the Statute of Wills; and he, having acquired the testamentary capacity of a domiciled Englishman, could gratuitously defeat the legal rights of his widow and children, according to the law of his and their domicil. The same or similar results would follow in the case of British subjects coming to Turkey from any part of Her Majesty's dominions where the law of testate succession differs from that of England.

The professed object of the order of the 12th of December, 1873, is, throughout, to confer jurisdiction upon the Consular Courts as thereby regulated, and to lay down rules for their procedure; and it is hardly conceivable that enactments framed for these purposes only, and not affecting to deal with substantive law, should have been intended to introduce such great and important alterations of the personal status and civil rights of Her Majesty's subjects. The enactments, which not only confer jurisdiction but specify the law to be administered by these Courts, give no

(1) 23 Ch. D. 532.

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indication that any such changes were contemplated. According to sect. 6, they are to administer the law for the time being in force "in and for England," an expression which simply denotes the law for the time being administered in the Courts of England; and, according to sect. 91, they are to have the same jurisdiction in probate as belongs to the English Court of Probate. If this suit had been brought in the Court of Probate here, there can be no doubt that the law applicable would have been that of the testator's domicil; but it was suggested for the appellant that the words "in and for England," must be read as if they had been "in England and for Englishmen." That construction would not avail her, because the testate succession of an Englishman is regulated by his domicil, which may be in France or elsewhere abroad. In order to support the argument, it would be necessary to make the gloss run thus, "in England and for Englishmen domiciled there." The suggestion has hardly the merit of plausibility, seeing that it involves the necessity of adding to the otherwise plain language of the enactment words which have the effect of giving it a totally different meaning.

The only part of the order which lends some colour to this branch of the appellant's argument is sect. 229, which relates to proceedings in the case of probate or administration with the will annexed. It provides that the Court shall ascertain whether the will propounded was signed by the testator, or some other person in his presence or by his direction, and subscribed by two witnesses, "according to the enactments relative thereto," and shall refuse probate if satisfied that it was not, in fact, executed in accordance with these enactments. The framers of sect. 229, which is, in terms, a rule of procedure, and nothing more, had obviously in view the English Statute of Wills, and they do not seem to have made provision for proceedings to prove a will executed in any other form, but that does not establish that a will executed in English form must necessarily be valid. There is no section of the order which enacts that the Court shall grant probate without reference to the capacity of the testator, and it does not follow from the terms of the 229th section that it was intended to override the general provisions of sect. 6, and to enact by implication that the capacity or incapacity of testators

is not to be determined by the laws which ordinarily govern their personal status. The directions of the order with respect to procedure in cases of intestacy leave untouched the provisions of sect. 6, so that the property of subjects and protected persons dying intestate must be administered by the Consular Courts in accordance with the law of their domicil. It can hardly have been contemplated that a man's personal status should be dependent upon the circumstance of his having made a will, and that subjects of the Queen, not being domiciled Englishmen, are to retain the status which they carried with them to Egypt if they die intestate, and must lose it if they leave a will which complies with the provisions of the English statute, as well as with the requirements of their domiciliary law. There can be no presumption that the provisions of the order with respect to procedure were intended to produce such anomalies; and, in the absence either of express enacting words, or of plain implication necessitating the inference, their Lordships cannot hold that the enactments of sect. 229 qualify the provisions of sect. 6, or in anywise affect the civil status of those residents in Egypt whose persons and estates are subject to the jurisdiction of Her Majesty's Consular Courts.

The next alternative presented by the appellant's counsel was this, that her husband had *de facto*, or at all events according to Ottoman law, lost his Turkish nationality, and had become a subject of the Queen. That change in his political status was said to be attended with one or other of these consequences, viz., either that his civil status became that of a domiciled Englishman; or, assuming his domicil to have been in Bagdad, that a Turkish tribunal would, in administering his estate, defer to the law of England, as the law of his nationality.

It is clear that the deceased was not, in the sense of English law, a subject of Her Majesty. Neither did he possess that status, within the meaning of the order, which expressly enacts that it must be attained either by birth or naturalization. But the appellant relied upon its having been determined, for the purposes of this litigation, in the final decree of the 24th of February, 1886, that he had "acquired the status of a protected British subject." The phrase "protected British subject" does not occur

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in the order; it has no technical significance; and it must therefore be taken to express that which the learned judge unquestionably meant to affirm, viz., that the deceased had *de facto* enjoyed the same measure of protection which is accorded by treaty to British subjects in the dominions of the Porte.

It was argued, however, that it is the law of Turkey, and not the law of England, which must determine, for the purposes of this case, whether the deceased ought to be regarded simply as a protected alien, or as a British subject who had cast off his allegiance to the Porte. Upon this point evidence was led on both sides. Four legal experts were examined for the appellant, who asserted that he had, and six for the respondents who asserted that he had not, become in the eye of Ottoman law, a subject as well as a protégé of Great Britain. All of these learned gentlemen were agreed that there is no Turkish text or judicial decision having any bearing upon the question; and they merely expressed their individual opinions as to the inference which an Ottoman tribunal ought to derive, and would probably derive, from the tenor of existing treaties, and the law on the subject of Ottoman nationality promulgated by the Porte on the 19th of January, 1869. Their Lordships do not consider it necessary to decide between these conflicting opinions, because a decision in her favour would not assist the appellant's case. If it be assumed that, in consequence of his having placed himself under foreign protection, the Porte resigned the deceased, both civilly and politically, to the law of the protecting power, that would merely give him the same rights as if his nationality had been English, and the territorial law of his domicil would still be applicable to his capacity to make a will, and to the distribution of his estate.

There is no evidence whatever tending to shew that the Courts of Turkey, in administering the estate of a person in the position of the deceased, would be guided not by their own municipal law, but by the rules followed by English Courts, in the case of domiciled Englishmen. But it was submitted that the appellant ought now to be allowed to lead proof for the purpose of establishing that proposition. The record contains no allegation, not even a suggestion, that there is any special law in Turkey

with respect to the succession of a protected person; and the appellant has already had ample opportunity of bringing forward such evidence as she thought fit, bearing upon the issues settled for the trial of the cause. In these circumstances, their Lordships do not think she is entitled to any further allowance of proof. There must still be some evidence taken, but it must be confined to the single point specified in the judgment appealed from.

The appellant lastly endeavoured to maintain that the deceased's residence in Cairo had at least the effect of giving him an Egyptian as distinguished from a Turkish domicil. That argument was not addressed to the Court below; but there appear to be two sufficient answers to it. The one is, that the appellant has not shewn that a domicil in Egypt, so far as regards its civil consequences, differs in any respect from a domicil in other parts of the Ottoman dominions; and the other, that residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice.

Their Lordships are accordingly of opinion that no cause has been shewn for disturbing the judgment of the Consular Court; and they will humbly advise Her Majesty to that effect. The appellant must bear the costs of this appeal; but their Lordships will humbly advise Her Majesty that the costs of all parties in the Court below ought to come out of the estate.

Solicitor for appellant: *T. Russel Kent.*
Solicitors for respondents: *Bolton, Robbins, Busk, & Co.*

[PRIVY COUNCIL.]

J. C.* 1888 *Feb.* 29; *March* 24.

SLATTERY . . . . . DEFENDANT;

AND

NAYLOR . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Municipalities Act, 1867, *s.* 153—*Validity of Bye-law—Unreasonableness.*

Held, that a bye-law made in pursuance of sect. 153 of the Municipalities Act, 1867, empowering municipal councils to make bye-laws for regulating the interment of the dead is not ultra vires, by reason of its prohibiting interment altogether in a particular cemetery and thereby destroying the private property of the owners of burial places therein.

Quære, whether and under what circumstances bye-laws can be set aside as unreasonable.

APPEAL from a judgment of the Supreme Court (Nov. 23, 1885) affirming a conviction by a justice of the peace for the colony sitting at New Town near Sydney.

The facts and proceedings are stated in the judgment of their Lordships.

Sir *Horace Davey*, Q.C., and *Leverson*, for the appellant, contended that the conviction was wrong. Both Courts below deemed themselves to be bound by the decisions in *Ex parte Flack* (1) and *Brooks* v. *Selwyn* (2), although two of the judges expressed dissatisfaction with them. Reference was made to the Municipalities Act (31 Vict. No. 2), ss. 117, 118 and 153. Power was given under sect. 153 to make bye-laws regulating the interment of the dead; but that related to public cemeteries as

* *Present*:—LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 1 N. S. Wales L. R. 27.

(2) 3 N. S. Wales L. R. 256.

mentioned in the two former sections, and did not extend to private cemeteries. The cemetery in question was a private one existing at the date of the Act. Further, the bye-law was ultra vires as prohibiting burials altogether in the cemetery in question, and thereby destroying private rights, viz. of those who possessed burial places therein. Reference was made to *Western Railway Company* v. *Windsor and Annapolis Railway Company* (1) and the cases there cited; *Wortley* v. *The Nottingham Local Board* (2); *Heap* v. *The Burnley Union* (3); *Wanstead Local Board of Health* v. *Wooster* (4). Further, the bye-law was unreasonable. It fixed unreasonable limits within which no burials may take place; the district in which the cemetery was situated was not populous, and the bye-law was more extensive than was required for the protection of the public. Reference was made to *Queen* v. *Wood* (5); *The Master and Company of Frame-work Knitters* v. *Green* (6).

Jeune, Q.C., and *C. E. Jones*, for the respondent, contended that the conviction was right. The bye-law was not ultra vires, because regulation included prohibition where the circumstances justified it, that is, where prohibition was necessary or incidental to regulation. The *Burnley Union Case* cited on the other side dealt with a superficial nuisance merely, and did not apply to this case, while it was contended that the *Wanstead Case* was in favour of the respondent. As to unreasonableness, the English Burial Acts from 1850 to 1854 imposed a limit of either 200 or 100 yards in a populous country where land was not easily obtained. Credit must be given to the judgment of the local council as to the requirements of its municipality, more particularly when abundant opportunity has been given and neglected for opposing it, either before the town council, whose meetings are public, or by petitions to the executive government, or to the legislature.

Sir *H. Davey*, replied.

(1) 7 App. Cas. 178.
(2) 21 L. T. (N.S.) 582.
(3) 12 Q. B. D. 617.
(4) 38 J. P. 21.
(5) 5 E. & B. 49.
(6) 1 Ld. Raym. 113.

J. C. 1888 SLATTERY v. NAYLOR.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The sole question in this case is whether a bye-law under which the appellant has been convicted and fined is valid or invalid. The bye-law was passed by the municipal council of the borough of Petersham on the 2nd of December, 1864, under the provisions of the Municipalities Act, 1867. The respondent is the inspector of nuisances for the borough. The appellant appealed to the Supreme Court, and the convicting magistrate stated a case, which contains the facts on which the decision of that Court was passed. It affirmed the decision of the magistrate, and their Lordships are now asked to decide that the affirmance was wrong.

The material portion of the bye-law is in the following terms:—

"No corpse shall be interred in any existing cemetery now open for burials within the distance of one hundred yards from any public building, place of worship, schoolroom, dwelling-house, public pathway, street, road, or place whatsoever within the borough."

A similar provision was made with respect to cemeteries afterwards opened.

Sect. 153 of the Municipalities Act provides that the council may from time to time make bye-laws for (among other things) regulating the interment of the dead. The bye-law was published in the *New South Wales Government Gazette* of the 19th of January, 1885, where it is stated to have been confirmed by His Excellency the Governor, with the advice of the executive council.

On the 27th of June, 1885, the appellant interred the corpse of his wife in his own family burial place in the Roman Catholic cemetery in Petersham. This cemetery had, from the year 1862 onwards, been used for the interment of members of the Roman Catholic faith; and in the year 1879 the appellant purchased a portion of it as a permanent burial place for members of his family. No part of the cemetery is distant more than 100 yards from a place of worship, schoolroom, dwelling-house, public street, road, or place within the borough. It is admitted that the place is not a populous one.

The Supreme Court was unanimous in its decision. But of the three judges, only the Chief Justice Sir James Martin agreed with the decision on principle. The other two, Justices Faucett and Innes, would have decided the other way if they had not thought themselves bound by two previous decisions on similar bye-laws of other municipalities under the same statute. Under these circumstances, the case was a proper one for appeal to Her Majesty in Council.

The appellant takes three objections to the validity of the bye-law; first, that it is ultra vires because it destroys private property; secondly, that it is ultra vires because the council have only power of regulating interments, whereas in the cemetery in question they have wholly prohibited them; and, thirdly, that it is unreasonable. These objections must be judged by reference to the provisions of the Municipalities Act, the material sections being those numbered 153 and 158. The former gives to the council the power of making bye-laws to provide for the health of the municipality, as well as to regulate the interment of the dead.

In support of the first objection, their Lordships have been referred to cases in which Acts of the legislature would, according to their full literal meaning, operate to take away private property without compensation; and in which Courts of Justice have, on account of the extreme improbability that the legislature should have intended such a thing, sought for some secondary meaning to satisfy its expressions, such as was the case of the *Western Counties Railway Company* v. *Windsor and Annapolis Railway Company* (1) before this Board. But a statute cannot be so construed if it shews an intention to override the private rights in question. The object of the present statute is to establish regulations for the common advantage of persons who have come to live in the same community, in a great number of matters affecting their daily life, and that cannot be done except by interference with many actions and many modes of enjoying property, which, but for such regulations, would be lawful and innocent. It is difficult to see how the Council can make efficient bye-laws for such objects as preventing fires, preventing and regulating places of

(1) 7 App. Cas. 178.

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amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property.

The interment of the dead is just one of those affairs in which it would be likely to occur that no regulation would meet the case except one which wholly prevented the desired or accustomed use of the property. It may well be that a plot of ground, having been originally far from habitations, and suitably used as the burying-place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In such a case a power to regulate would be nugatory unless it involved a power to stop the burials altogether. Their Lordships hold that the bye-law in question is not ultra vires, because in certain circumstances it may have, as in Mr. Slattery's case it unfortunately has, the effect of taking away an enjoyment of property for which alone that property was acquired and has been used.

The considerations applicable to the second objection have, to a great extent, been anticipated by the answer to the first. It is true that, in regulating the interment of the dead, the bye-law makes the cemetery useless for its former purpose. This, it is argued, is not regulation but prohibition, and it is pointed out that, with regard to several objects of the bye-laws, prevention and suppression are expressly allowed by the Act, whereas in the case of interment only regulation is allowed. One illustration of regulation proper, as distinct from prohibition, was found in another bye-law laying down rules as to the number of corpses in a grave and their depth below the surface. Now if, at the passing of the bye-law, a grave was already so full that it could not, consistently with the bye-law, receive another corpse, the bye-law would amount to a complete prohibition of burial, although the owner of the grave may have contemplated that in death he should be laid by those whom he loved best in life.

To regulate the place of burial is certainly one of the most important points in regulating burials for the health of a community, perhaps the most important of all. It is indeed a serious

thing to prevent people from indulging their affections in a matter which they justly consider so sacred as the disposal of their dead. Such prohibitions should be well considered before they are passed. But they are undoubtedly necessary in large and growing communities. And their Lordships cannot hold that a bye-law is ultra vires because, in laying down a general regulation for the borough of Petersham, it has the effect of closing a particular cemetery.

It is contended that the bye-law is unreasonable on three grounds. First, that it is not wanted, the place not being populous. Secondly, that it does not, as is usually done in England, make any provision for the case of a person who may have a special claim to use the prohibited burying-place. Thirdly, that a belt of 100 yards must be kept vacant all round a cemetery, which will be onerous for all, and probably impossible for some; otherwise any private owner of land may, without regard for any interest but his own, or even from malice, place a dwelling-house in such a position as to prevent future burials.

As regards the necessity for the bye-law, there is no evidence whatever on which their Lordships can form an opinion. It is merely said that the place is not a populous one. Even supposing that the place mentioned means the borough of Petersham, and not merely the neighbourhood of the cemetery, which is not clear, the statement is far too vague to be of any use. It may be quite populous enough to require such a bye-law. The matter is one on which the judgment of the local authorities should not be lightly superseded.

The other two grounds are more substantial. It is possible that if we were now discussing how the bye-law should be framed, it might seem more wise and prudent to make it less absolute. It might be wiser, even at the expense of some inconvenience to the community, to make some concession to one of the most softening and refining of human feelings, the reverence and love that is felt for the dead, and the desire of resting in the same spot with them. It might be more prudent not to give any person the means of disturbing a cemetery by the mere building of a house. But supposing that to be so, it is quite a different question whether a bye-law like the present one is to

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be held unreasonable because such considerations have been overlooked or rejected by its framers.

The jurisdiction of testing bye-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned.

We are dealing with the proceedings of a local authority in a colony, where the extent of area is large and population grows fast. The Act of 1867 provides methods for the more effectual establishment of local institutions. It creates a representative council, elected annually by the constituency, and gives to it jurisdiction over the large range of affairs enumerated in sect. 153 and some other sections. By sect. 158 it is enacted that all bye-laws "consistent with the provisions of this Act, and not repugnant to any other Act or law in force in the colony of New South Wales, shall have the force of law when confirmed by the Governor, and published in the *Government Gazette*, but not sooner or otherwise." And provision is made for laying copies of such bye-laws before both Houses of Parliament.

It is certainly not clear that Courts of Law are not precluded by s. 158 from inquiry whether or no a bye-law is reasonable. Sir Horace Davey argued on this point that it is a necessary condition of every bye-law that it shall be reasonable, that a power to make bye-laws means a power to make reasonable bye-laws, and that no bye-law can acquire the force of law under s. 158, except such as are consistent with the implied as well as the express provisions of the Act. According to this argument, the question whether a bye-law is reasonable is only one branch of the question whether it is ultra vires.

If it were possible to conceive that a council such as that of Petersham could frame, and that the Governor of New South Wales could confirm and publish, a merely fantastic and capricious bye-law, such as reasonable men could not make in good faith,

such, for instance, as a bye-law providing that the Roman Catholic cemetery should be closed to the Roman Catholic community, but remain available for others, it would raise in a very crucial shape the question whether a Court of Law could set it aside as unreasonable. Let it be assumed, notwithstanding s. 158 of the Act, that such a jurisdiction exists. It is quite a different question whether a bye-law can be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges.

Every precaution has been taken by the legislature to ensure, first, that the council shall represent the feelings and interests of the community for which it makes laws; secondly, that, if it is mistaken, its composition may promptly be altered; thirdly, that its bye-laws shall be under the control of the supreme executive authority; and, fourthly, that ample opportunity shall be given to criticize them in either House of Parliament. Their Lordships feel strong reluctance to question the reasonable character of bye-laws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a Court of Law, unless it be in some very extreme case, such as has been indicated.

In the present case, so far from there being ground for thinking the bye-law to be capricious or oppressive, there is good evidence that the communities of New South Wales consider that bye-laws of this nature are reasonable and suitable to their circumstances. In the case of *Ex parte Flack* (1), which was decided in 1880, it appeared that a bye-law had been passed by the municipality of Leichardt and gazetted on April 8, 1875, to the same effect with the Petersham bye-law, except that the prescribed distance was 100 feet instead of 100 yards. A conviction for infraction of that bye-law was upheld by the Supreme Court. The same view was taken in *Brooks* v. *Selwyn* (2) decided in 1882, when a bye-law identical with the Petersham bye-law was passed by the borough of Newcastle, and gazetted on the 27th of August, 1881. In this case the justices refused to convict, on the ground that the bye-law was ultra vires, and the Supreme Court reversed their decision. It is clear then that, at least from the year 1875, municipal councils in New South Wales have been passing, and

(1) 1 N. S. Wales L. R. 27. (2) 3 N. S. Wales L. R. 256.

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Governors in council confirming, bye-laws of this kind; and it does not appear that the Houses of Parliament, on whose tables the bye-laws are placed, have thought it necessary to modify the powers conferred in 1867, or to interfere with their exercise.

The result is that in their Lordships' opinion the two prior decisions are right in law; that the Court below did right to follow them in this case; that its judgment should be affirmed, and this appeal dismissed. The appellant must pay the costs. They will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellant: *Want & Harston.*
Solicitors for respondent: *Phelps, Sidgwick & Biddle.*

[PRIVY COUNCIL.]

J. C.* 1888 *March* 21, 22.

THE OWNERS OF THE BRITISH STEAMSHIP "GLAMORGANSHIRE". . . . } DEFENDANTS;

AND

THE MASTER, OWNERS AND CREW OF THE AMERICAN SHIP "CLARISSA B. CARVER" . . . . . } PLAINTIFFS.

THE OWNERS OF THE "GLAMORGANSHIRE". . . . . } DEFENDANTS;

AND

S. D. WARREN & CO. . . . . PLAINTIFFS.

THE "GLAMORGANSHIRE."

(CONSOLIDATED APPEALS.)

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AND JAPAN AT SHANGHAI.

Maritime Regulations, Section III., Articles 3 (b) and 5—Presumption of Culpability.

Where a ship carried a bright light of such a character as to be visible at three miles distance, which though fixed in the rigging was not shewn to have been intercepted by the clew of the foresail or otherwise:—

Held, there was no breach of maritime regulations, articles 3 (*b*) and 5 of

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* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

section III., and therefore no presumption of culpability on the part of such ship, according to the principle laid down in the *Fanny M. Carvill* (1) as contributing to the collision in respect of which she sued.

Where the plaintiffs in an action for damage to cargo had indorsed their bills of lading to the bank to secure advances:—

Held, that they retained an interest in the cargo sufficient to enable them to maintain their suit, the money recovered to be for the benefit of the parties shewn to be entitled thereto.

CONSOLIDATED appeals from two decrees of the Supreme Court (April 10, and May 31, 1886) affirming judgments of Her

(1) 1875. June 9.

[PRIVY COUNCIL.*]

OWNERS OF THE "FANNY M. CARVILL" . . } DEFENDANTS;
AND
OWNERS OF THE "PERU" AND OTHERS . . } PLAINTIFFS.
THE "FANNY M. CARVILL."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Merchant Shipping Act, 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Construction—Art.* 3 *of Regulations for preventing Collisions—Infringement.*

By the true construction of the Merchant Shipping Act, 1873, sect. 17, a British ship cannot be pronounced in fault merely by reason of its non-observance of a maritime regulation. A presumption of culpability in case of collision thence arises, but such presumption may be met by proof that the infringement could not by any possibility have contributed thereto.

Where a ship infringed art. 3 of the Sailing Regulations by carrying her side lights with screens shorter than the length prescribed thereby, but it was proved that such breach of the Regulation could not possibly have contributed to the collision:—

Held, that the ship could not be deemed to be in fault.

APPEAL from a decree of the High Court of Admiralty.

Butt, Q.C., and *Webster*, for the appellants.

Milward, Q.C., and *Clarkson*, for the respondents.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is a case of collision between the American barque the *Fanny M. Carvill*, and the Swedish barque *Peru*. The undisputed facts of the case are that the collision took place about half-past nine of the evening of the 18th of November, 1874, some fourteen or fifteen miles off Beachy Head; that both vessels were beating down Channel close hauled against a westerly wind, and were crossing so as to involve risk of collision; that the *Fanny M. Carvill* was on the port, and the *Peru* on the starboard tack, and accordingly that it was the duty of the former to get out of the way of the latter, and the duty of the latter to keep her course. Of the case made by the appellants in order to excuse the failure of the *Fanny M. Carvill*

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR HENRY S. KEATING.

J. C. 1888

THE "GLAMORGANSHIRE."

Britannic Majesty's Court for Japan (October 12, and October 20, 1885).

The actions were brought to recover damages in respect of a collision between the *Peru* and the *Fanny M. Carvill*, which occurred on the 20th of August 1885, in the Inland Sea of Japan, off the island of Awaji. The *Peru* was a steamship of 1,600 tons, and the *Fanny M. Carvill* a barque of 1,200 tons. The *Peru* was proceeding from Hiogo to Yokohama, and the *Fanny M. Carvill* from Yokohama to Hiogo. The *Peru* was damaged to the extent of £1,000, and the *Fanny M. Carvill* to the extent of £2,000. The *Peru* was in charge of a pilot, and the *Fanny M. Carvill* was under the charge of a Japanese pilot. The collision occurred about 2 A.M. on the 20th of August, and was caused by the *Fanny M. Carvill* coming into contact with the *Peru* on the latter's starboard side. The weather was fine, and the night was dark, but the lights of the vessels were seen in sufficient time to avoid the collision. The *Peru* was proceeding at the rate of 10 knots an hour, and the *Fanny M. Carvill* at the rate of 8 knots an hour. The *Peru* was steering a course of E.N.E., and the *Fanny M. Carvill* a course of W.S.W. The *Peru* was on the starboard tack, and the *Fanny M. Carvill* on the port tack. The *Peru* was the vessel which was required to keep out of the way of the *Fanny M. Carvill*, and to cast the responsibility of having caused the collision wholly or partially on the latter, the material allegations are that those on board the *Peru* improperly neglected to keep their course, and that the lights of the *Peru* were improperly fixed and screened.

The principal witness in support of this defence was Martin Scheringer, the mate of the *Fanny M. Carvill*, and the officer of the watch at the time of the collision. His testimony is, that when the *Peru* was first sighted he saw her red light; that he knew she must be beating down Channel, close-hauled on the starboard tack, and that it was his duty to keep out of her way; but that before he took, or could take, any means towards that end, she opened her green light, and continued to shew both her lights for ten minutes; that, inferring from this that she was bearing away, he kept his own course, after shewing a flash light in order to make the other vessel give him a free berth; but that she, after having apparently kept away at least two points, ultimately luffed four points, with her sails aback and shivering, shutting out by the last manœuvre the green light; and this caused the collision.

Their Lordships must remark on this evidence that it is inconsistent with any theory except an actual deviation from her course on the part of the *Peru*. If, as is now suggested, the improper length of the screen would account for the fact that the green light was seen by those on board the *Fanny M. Carvill*, although the *Peru* may have kept her course, it would not account for what the mate has sworn touching her luffing and the appearances of her sails. It is therefore material to come to a clear conclusion upon the question whether the *Peru* did, in fact, keep her course. That she did so their Lordships have no doubt. The learned Judge of the Court of Admiralty, upon the conflicting evidence before him, has found in terms: "That the *Peru*, a starboard-tacked vessel, continued on her course without alteration up to the time of the collision; that it is untrue, as stated by the witnesses on the part of the *Fanny M. Carvill*, that the *Peru* ever came right up into the wind two and a-half points with her sails flat aback."

There is nothing in the case to induce their Lordships to doubt the correctness of this finding, which is materially confirmed by the fact that, in the first instance, the master of the *Fanny M. Carvill* had so little faith in the account given by his own officer, that he openly threw the blame of the collision upon him, and would, under legal advice, have admitted his liability, had it not been ascertained that the screens of the *Peru*'s lights were of less than the prescribed length. And accordingly, the learned counsel who argued the appeal have faintly, if at all, contended that the *Peru* did, in fact, alter her course, and have chiefly directed their arguments to shew that the green light was, by means of the defect in the screen, visible to those on board the *Fanny M. Carvill*, was, in fact, seen by them; and, therefore, naturally gave rise to the inference that the *Peru* was bearing away.

To this defence, as to that founded

collision between the British steamship *Glamorganshire* and the American ship *Clarissa B. Carver*. In the first action the appellants also counter-claimed for damage sustained by them through such collision.

on an actual deviation by the *Peru* from her course, it is essential to establish that the green light was, in fact, seen by those on board the *Fanny M. Carvill* across the bows of the *Peru*. Upon this point there is the direct evidence of the mate and look-out man, who, having been disbelieved upon other points, cannot be treated as trustworthy witnesses. Their evidence on this point, however, is in some degree corroborated by that of the captain, the surveyors for the Board of Trade, and the other witnesses who were called to prove that the green light might be seen across the bows of the *Peru*. On the other hand, there was a considerable body of testimony to the contrary, and the learned Judge of the Admiralty, upon this conflict of evidence, has found as a fact that the green light of the *Peru* was not seen across the bow of the *Peru* by those on board the *Fanny M. Carvill*, and, therefore, could not have contributed to the collision. Their Lordships are so far from dissenting from this finding, that they are prepared to go beyond what is directly expressed by it, and to hold, upon the evidence before them, and for the reasons next to be stated, that in the circumstances in which these vessels were placed, the green light of the *Peru could not by any possibility have been seen* by those on board the *Fanny M. Carvill*.

The vessels, though on opposite tacks, were both close-hauled, and may be assumed to have been sailing within six points of the wind, whether the direction of that was west, or two points to the north of west. This being so, their Lordships are of opinion that each must first have seen the other as stated by those on board the *Peru*, about two points on her own lee bow. For if the bearing of the *Peru*, when first sighted by the *Fanny M. Carvill*, was four, or even three points on the lee bow of the latter, as stated by her mate, it is difficult to see how the two vessels, sailing as they were sailing, and each keeping her course, could ever have come in collision. Now their Lordships are satisfied that the green light of the *Peru* could not have been visible two points over her port bow, if the screen projected, as it is proved to have projected, considerably more than one foot from the position of the light in a direction parallel to the keel. For these reasons, as well as upon the direct evidence in the cause, they have come to the conclusion, in which they are confirmed by their assessors, that the green light of the *Peru* not only was not, but could not by possibility have been seen by those on board the other vessel; and, accordingly, that the defect in her screens neither did, nor could have contributed to the collision. This conclusion was probably intended to be implied, though it is not in terms expressed, in the finding of the Court of Admiralty. These being the facts of the case, it follows that the *Fanny M. Carvill*, which failed to keep out of the way of the *Peru*, must be pronounced solely to blame for the collision; unless by force of the 17th section of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), as construed in the recent case of *The Hibernia* (2 Asp. Mar. Cas. 454) the *Peru* is to

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The respondents, the plaintiffs in the first action, were the captain, owners and crew of the *Clarissa B. Carver*. The respondents, S. D. Warren & Co., the plaintiffs in the second action,

be deemed to be also in fault; although the particular infringement of the sailing rules imputed to her neither did, nor could by possibility have contributed to the accident.

The words of the statute are, "If, in any case of collision, it is proved to the Court before which the case is tried, that any of the regulations for preventing collisions contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary."

The alleged infringement is of that part of art. 3 of the Sailing Rules which prescribes that "the green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow." The screen of the *Peru* is shewn to have been nearly a foot (about eleven inches) short of the prescribed length. It must be assumed that those under whose advice the rule was framed considered that a length of three feet was necessary in order to prevent the light from being seen, under any circumstances whatever, across the bow. And there is evidence in the cause, independent of that of the discredited witnesses, to shew that, under some circumstances, the green light might be perceptible across the bow. Their Lordships, therefore, notwithstanding their conviction that the green light could not have been seen more than a very few degrees (if at all) across the bow of the *Peru*, will assume that there was an infringement of the regulation within the meaning of the statute. And it has certainly not been shewn that the circumstances of the case made a departure from the regulation necessary.

In construing the clause in question, it is to be observed that the Act of 1873 did not repeal, nor was it a substitute for, the Merchant Shipping Acts of 1854 and 1862. On the contrary, its 2nd section declares that it is to be construed as one with them. Now, the 298th section of the Act of 1854, and the 29th section of the Act of 1862, provides each that in certain cases of infringement of the sailing regulations those guilty of the infringement shall incur certain consequences. But each contains the qualification that the collision shall appear to the Court to have been occasioned by the non-observance of the regulation infringed. When, therefore, in the 17th section of the Act of 1873 the legislature omitted this qualification, it must be presumed to have done so designedly, and, at all events, to have intended that it should no longer be incumbent on the opposite party to prove that the non-observance of the regulations in fact contributed to the collision. Nor does it appear to their Lordships that the 17th section of the Act of 1873 can be taken merely to shift the burthen of proof by raising a presumption of culpability, to be rebutted by proof that the non-observance of the rule did not in fact contribute to the collision, because the preceding (the 16th) section clearly shews that where the legislature in-

were the owners of 3000 bales of rags, which had been shipped on board the *Clarissa B. Carver*, on account and risk of S. D. Warren & Co., to be carried to Portland, Maine.

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tended only to raise a presumption capable of being rebutted by such proof it used apt words to express that intention.

Their Lordships therefore conceive that, whatever be the true construction of the enactment in question that which would take the case out of its operation by mere proof that the infringement of the regulation did not, in point of fact, contribute to the collision, is inadmissible. They conceive that the legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence.

There remain, however, two other possible constructions. The first is that, on proof of an infringement of any of the regulations for preventing collisions, there arises, subject only to the qualification contained in the final clause of the section, an absolute presumption of culpability against the vessel guilty of such infringement, to which the Court is bound to give effect, whatever the nature of the infringement may be. The other is that the infringement must be one having some possible connection with the collision; or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision.

The former of these constructions, though possibly the more consistent with the literal meaning of the words of the section, seems to their Lordships to be the less reasonable of the two. It not only leads to the extravagant consequences pointed out by the learned judge of the Admiralty Court; it implies an intention which, without the plainest language, can hardly be imputed to the legislature. For it is one thing to say that when the circumstances shew that the infringement of the regulations might have contributed to the collision, the Court shall conclusively infer that it did so. It is another, and very different thing to say, that the Court shall draw the same inference, when the circumstances shew that the infringement, from its nature, could not possibly have contributed to the collision. In the latter case the legislature would entirely alter the nature of the shipowner's liability. As the law stood, he was civilly liable in damages for the consequences of his act or omission. The new law, so far as it enacts that the consequences which might have flowed from that act or omission, shall be presumed to have flowed from it, does not affect the nature of that civil liability. But on the supposed construction it would virtually substitute for a civil liability which the shipowner could not have incurred, a penalty for the infringement of the regulations irrespective of the nature or possible consequences of that infringement; a penalty, moreover, of uncertain application since it is dependent on a collision, and varying in severity with the injury done by the collision. It would, in effect, make the vessel guilty of the infringement, a sort of outlaw of the seas, by depriving her of the right to recover, under any circumstances, more than half the damages to which, by the general law maritime, she might become entitled. Again, it can hardly be denied, though the words perhaps

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The learned judge of the Court for Japan found all points in both actions in favour of the respondents, giving them respectively judgment, with costs, subject to a reference as to the amount of damages, and dismissing the appellants' counterclaim.

The Supreme Court affirmed the judgment of the Court below in favour of the respondents, the captain, owners and crew of the *Clarissa B. Carver*; and by a later decree affirmed the judgment of the Court below in favour of S. D. Warren & Co., and supplemented it by the addition thereto of the following order: "And it is ordered, that the money which may be awarded under the reference herein be not paid to the plaintiffs until it shall have been satisfactorily established that the payment will release the owners of the said steamship *Glamorganshire* from all claims on behalf of any consignees or indorsees of the bills of lading."

Sir *Walter Phillimore*, Q.C., and *Stokes*, contended that there was no evidence of negligence on the part of the appellants, and

admit of such a contention, that the infringement proved must be one existing at the time of the collision. And if this be so, it seems but reasonable to infer that it must also be one that has some possible connection with the accident. Their Lordships are of opinion that the second construction, which is not absolutely inconsistent with the phraseology of the enactment, and is by far the more reasonable of the two, ought to be adopted. It gives effect to the statute by excluding proof that infringement, which might have contributed to a collision, did not in fact do so; and by throwing on the party guilty of the infringement the burthen of shewing that it could not possibly have done so.

Applying this construction of the statute to the facts found, their Lordships are of opinion that if, in this case, both vessels had been British ships, the *Peru* could not have been pronounced in fault. This conclusion renders it unnecessary to consider whether this particular clause in the statute is applicable to foreign vessels, —whether, in other words, it falls within the principle enforced in *The Amalia* (Brown. & Lush. p. 150) or that enforced in *The Saxonia* (1 Lush. p. 410).

That this question, which is not free from difficulty, will have to be determined, at no distant date, is highly probable. But their Lordships abstain the more willingly from considering it at present, because it was not very fully argued before them.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Admiralty, and to dismiss this appeal with costs.

Solicitors for appellants: *Stokes, Saunders, & Stokes.*

Solicitor for respondents: *Thomas Cooper.*

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that the lights of the *Clarissa B. Carver* did not comply with the regulations: see *The Fanny M. Carvill* (1), and *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (2). The lights were carried in the wrong place, i.e., in the rigging, on the slope, so that they did not shew horizontally, and being so carried were obscured laterally and by the foresail. Moreover, the title of S. D. Warren & Co. to the goods in respect of which they sued was not made out.

Myburgh, Q.C., and *Melsheimer*, for the respondents, contended that the collision and consequent damage were solely due to the negligence of those on board the *Glamorganshire*, and that no blame was attributable to those on board the *Clarissa B. Carver*. There had been no breach of the maritime regulation, and therefore no presumption of culpability.

Stokes, replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case two actions have been brought in Her Majesty's Court of Japan, sitting as an Admiralty Court, against the steamship *Glamorganshire* or her owners. One is by the owners of the American sailing ship *Clarissa B. Carver* for damage done to that ship, and the other by S. D. Warren & Co., who say that they are owners of the cargo on board the *Clarissa B. Carver*, for damage done to the cargo. The contention is that the *Glamorganshire* is solely in fault for a collision that took place between the two ships. The *Glamorganshire* contends either that she was not in fault, or that the *Clarissa B. Carver* contributed to the collision. By arrangement between the parties the evidence has been taken in both actions together, and though there are separate judgments given in the actions they were in effect tried together. The same arrangement has been pursued before their Lordships. The appeals have been consolidated, the same counsel appeared for the respondents in the two cases, and their Lordships are dealing with the cases uno flatu.

(1) Ante, p. 455. (2) 5 App. Cas. 893.

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The Court of Japan decided both actions in favour of the plaintiffs. The defendants, the owners of the *Glamorganshire*, appealed to the Supreme Court for China and Japan, and that Court affirmed both the decrees, the decree in the ship case absolutely, and the decree in the cargo case with a modification which will be mentioned presently.

To take first the ship case. There are many questions raised in the actions as to the conduct and handling of the ships, which have been settled by the concurrent decisions of the two Courts in a way which the counsel for the *Glamorganshire* have felt that they could not dispute, having regard to the rule which prevails in this tribunal respecting the effect of concurrent decisions on pure questions of fact. But there is one question left, on which it is argued that this tribunal should review the decisions of the Courts below, though they are in effect concurrent. It is said that there was some variation of the ground taken by the Courts below, and that the matter is open to their Lordships now. The contention amounts to this: that the ship *Clarissa B. Carver* committed a breach of the Maritime Regulations, and, having committed that breach, her case falls within the principle which was laid down in the case of *The Fanny M. Carvill* (1), that where there was a breach, the presumption of culpability on the part of the vessel committing it can only be met by proof that the disaster in question could not by any possibility be attributed to the breach. But then in order to attract that principle, and to get the benefit of it, there must first be shewn that there was in fact a breach of the regulations, and that must be proved like any other fact in the case. It is not sufficient to say that from the facts proved there might possibly have been some breach of the regulations. Proof must be given leading up to the conclusion that there was a breach, and then, if that breach could possibly have led to the disaster, the ship must be held to blame on the principle laid down in *The Fanny M. Carvill* (1).

Now the regulation which is said to be infringed is article 3 (*b*) of section III. It provides that a steamship shall carry "on the starboard side a green light so constructed as to shew an uniform and unbroken light over an arc of the horizon of ten points of the

(1) Ante, p. 455.

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compass; so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side; and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles." By article 5 that regulation is extended to sailing vessels.

It is said that that regulation has been infringed in two particulars. First, it is said that the light was too dim; that it was not "of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles." Upon that point both Courts have elaborately examined the evidence, and they have come to the conclusion that the witnesses on board the *Clarissa B. Carver*, who all spoke one way, and who gave clear testimony that there was a bright light which they calculated would be visible at three miles, were to be believed, and that there was no infringement of the regulation upon that point. Their Lordships think it necessary to say nothing further upon that point, excepting that as the evidence has been brought before them, they consider that the Courts came to a right conclusion.

But then another point was made. It is said that the light was fixed in the rigging and that that is an improper place to fix the light. The answer is that the regulation does not say it shall not be fixed in the rigging; and not only is it not contrary to the regulation; it is a common practice; and in American ships appears to be a very common practice—it would seem almost to be the common practice. The naval officers who have assisted their Lordships in this case concur with the evidence given on this point.

Then it is alleged that the light was so fixed that the foresail or some portion of the foresail would interfere so as to prevent the lamp shewing a uniform and unbroken light over an arc of the horizon of ten points of the compass. It is important to see how that allegation was dealt with in the Courts below. Before the Court of Japan the same point was raised, and the judge deals with it in this way: "It is said the clew of the foresail, or the foresail itself, may have obscured it"—that is the lamp—"and, in support of this, a number of witnesses were called by the steamer to shew what the usual heights of the clew and foot

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of the foresail above the rail of a ship are. Against this evidence of the usual height is brought the positive testimony of the crew of the *Clarissa B. Carver*, who say that the clew was about six feet, and the foot of the sail eight or nine feet above the rail." Then he holds that these witnesses are to be believed. It is quite true that in giving his reasons why they should be believed, an inaccurate reference is made to the evidence of two witnesses who have spoken as to the height of the clews of foresails on other ships, but in their Lordships' judgment that inaccuracy is immaterial to the conclusion to be drawn; and it is certainly some proof of the satisfactory character of the judgment of the Court of Japan, that the contention as to the clew of the foresail was abandoned in the Court of Appeal. The Supreme Court in their judgment upon that appeal make these remarks: "Then as to the *Clarissa B. Carver's* green light having been obscured in some way or other, we remark that the learned counsel for the appellants did not even attempt to uphold the theory suggested in the Court below, viz., that the light in question might have been obscured by the clew or foot of the *Carver's* foresail, but propounded to us an entirely different explanation, viz., that the light might have been, and probably was, obscured by a single or double rope, known to sailors as the 'lee foretack.' We have taken the opinion of our nautical assessors upon the point, and we are advised by them that it is in the highest degree improbable that the 'lee foretack' could in any way have obscured the light from the view of those on board the *Glamorganshire*. It appears to us to be unnecessary to say anything further on this part of the case."

Now the theory which was put forward in the Court of Japan and abandoned in the Supreme Court of China and Japan, is put forward again, and it certainly comes here under some disadvantageous circumstances, but their Lordships have paid careful attention to the evidence, and propose to decide the case according to their view of that evidence.

There is nothing in the diagrams which are exhibited, and nothing in the evidence as to the construction of the ship, to shew that there was any necessary interference with the light by the clew of the foresail, or any strong probability that the light

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would be so interfered with. The argument rather rested on suggestions by counsel of exceptional circumstances (as, for instance the yard being tilted, or the sail bellying out in a particular way) which might possibly create an interference by the sail with the light; but there is nothing in the evidence to shew that such circumstances ever existed, or induce their Lordships to think that there was any breach of the regulation. The only positive assertion of the witnesses for the appellants is that the people on board the *Glamorganshire* did not see the light of the *Carver*, and therefore they agree that something must have hidden it. But from the direction in which the ships were approaching it seems to their Lordships that even if under any circumstances the clew of the foresail could interfere with the range of the light, it could not have so interfered as to intercept the light from the eyes of the persons who were on board the *Glamorganshire*, and having consulted the nautical assessors, they are advised that according to the evidence the case would be so.

Then going to what the other witnesses say, all the principal people on board the *Clarissa B. Carver* have been examined, and the effect of their evidence is this: that the lights were fixed from three to four feet above the rail of the ship. Upon that point the master of the ship was examined, the pilot, the first mate, the carpenter, three able seamen and a cabin boy, and some say three feet, others three and a half feet and four feet. A diver was employed by the *Glamorganshire*. He went down, and according to his measurement the screen in which the lamp was fixed was four feet above the rail. Then comes the question what is the height of the clew above the rail, for if the height of the clew is such as to give the lamp free play below the clew, it is an utter impossibility that the clew should have interfered with the range of the light. As to the height of the clew, the first mate was examined, the carpenter was examined, and the second mate, who was also the man on watch, and who was sent for by the captain about the time of the collision—a little before—to see whether the light was visible and burning brightly, and who found that it was so. Those persons tell us that the clew of the foresail was from five and a half to six feet above the

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rail. If that be so there was ample space for the light to play between the very lowest elevation of the clew of the foresail and the point above the rail at which it was fixed. Therefore their Lordships come to this conclusion, that even if it could be held that an occasional obscuration of light by the sail under exceptional circumstances was a breach of the regulation, the evidence in this case is to the effect that there never could be any interference at all by the sail with the lamp; that therefore there was no breach of the regulation; that the *Clarissa B. Carver* is not to be held to blame in any way, and that the judgment appealed from is a right judgment.

Now with respect to the cargo action. The objection there is that the plaintiffs have not proved their title to maintain the action. The evidence given of their title was that of Galtzow, who was the clerk or in the employ of Messrs. Paul Heinemann & Co. His evidence is that the cargo was shipped by Messrs. Paul Heinemann & Co., and shipped by the order of the plaintiffs; that it was deliverable to Barings; that $22,000 had been borrowed—he does not say by whom—probably by Heinemann & Co. of the Hong Kong bank, and that the bill of lading was indorsed over to the bank. No doubt that does not shew a clear title to the money in the plaintiffs, but it does shew that they had an interest in the cargo, and their Lordships hold that that interest is sufficient to enable them to maintain the suit.

The judge of the Court of Japan passed a decree that the plaintiffs do recover from the defendants damages to be ascertained on the usual reference to the registrar. At the same time he offered to the defendants a modification of that decree to the effect that the money should not be paid until the various claims against it were ascertained. Apparently they refused that modification, and they appealed to the Supreme Court to get the decree reversed. The Supreme Court affirmed the decree on the merits, but at the request of the appellants appended this modification: "That the money which may be awarded under the reference herein be not paid to the plaintiffs until it shall have been satisfactorily established that the payment will release the owners of the steamship *Glamorganshire* from all claims on behalf of any consignees or indorsees of the bills of lading." That

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seems to their Lordships to meet exactly the justice of the case. They think that the plaintiffs have an interest to maintain the suit to recover the money for the benefit of those persons who on the inquiry are proved to be entitled to it, and under circumstances in which the money will not be paid out till the owners of the *Glamorganshire* are completely freed from all claims.

The result is that, in their Lordships' opinion, the appeals fail and should be dismissed and the respective decrees affirmed, and they will humbly advise Her Majesty to that effect. The appellants must pay the costs of the appeals.

Solicitors for appellants: *Stokes, Saunders, & Stokes.*
Solicitors for respondents: *Bowman & Crawley-Boevey.*

[PRIVY COUNCIL.]

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REDFIELD AND OTHERS . . . . . APPELLANTS;

AND

THE CORPORATION OF WICKHAM . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Railway—Liability of Railway to Seizure and Sale—Dominion Act, 46 *Vict.* c. 24—*Quebec Act*, 43 & 44 *Vict.* c. 49, s. 11.

Held, that sect. 11 of Quebec Act, 43 & 44 Vict. c. 49, which provides that nothing in the Act shall affect suits then pending, applies also to proceedings in execution, and that therefore the property of a railway company governed by that Act was not precluded thereby from being attached in execution of the respondent's judgment against the company:

Held, further, that the railway undertaking in suit, which had become a Dominion railway before the respondent's writ of fi. fa. issued, and was governed by Dominion Act, 46 Vict. c. 24, could be seized and sold, subject to its mortgages, for the debts of the company to which it belonged.

APPEAL from a judgment of the Court of Queen's Bench (May 7, 1885) affirming a judgment of the Superior Court for

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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the District of Athabaska (June 2, 1884). The judgments were rendered in the matter of an opposition afin de distraire filed by the appellants opposing the sale by the sheriff, under a writ of fi. fa. de bonis et terris, of a railway and its appurtenances to satisfy a judgment obtained by the respondent against the South-Eastern Railway Company to which they belonged. The grounds of the application were:—

1. Because the railway and property could not be seized or sold at the suit of an ordinary judgment creditor of the South-Eastern Railway Company, inasmuch as, previous to the seizure, they had been legally conveyed to the trustees of certain bondholders for valuable consideration.

2. Because the trustees and bondholders had more than a mere right of preference and priority over other creditors of the company, and a sale of the railway by the sheriff would deprive them of their rights and remedies against the railway as secured to them by the deed of trust; inasmuch as, so long as there was default in the payment of interest, they were entitled to the possession of the railway as their security, and a sheriff's sale would deprive them of the remedy secured to them by their mortgage and deed of trust.

3. Because no part of the interest due upon the bonds had yet been paid, and the bondholders had expended $100,000 in repairing, maintaining, and operating the railway.

4. Because the trustees had a right of retention and of use and occupation of the railway until the overdue interest shall have been fully paid, and the railway was not seizable, nor could the same be alienated by the railway company or by any seizing creditor, until the entirety of the bonds in principal and interest shall have been fully paid and discharged.

5. Because the property was seized super non domino et non possidente, and the seizing creditor had not in and by the procès verbal of seizure enumerated or described the quality, quantity, or nature of the rolling stock, or what he described as the appurtenances of said railway, neither had he given any miles or bounds, measurement, extent, or description of the terminal lands of the railway.

And the appellants prayed that the railway and its appurte-

nances might be declared to be their property and released from seizure; otherwise, that the judgment creditor should be held to give security that the property should realize at the sale the amount due on the bonds.

The respondent answered that by Quebec Act, 43 & 44 Vict. c. 49, the company had no power to part with the ownership of the railway, but only to mortgage the same as security for the bonds, and that by the trust deed in question the appellants only obtained the privileges of mortgagees, and not the rights of absolute owners, and that their right to collect tolls and profits only lasted so long as the ownership of the railway remained in the company. Further, that 43 & 44 Vict. c. 49, having regard to sect. 11, could not be set up against the appellants, whose suit was pending at the date of its enactment.

The Superior Court dismissed the opposition of the appellants, on the ground that they were not absolute owners of the said railway, but had only a charge thereon to secure the payment of the creditors; that the company was not under 43 & 44 Vict. (Quebec), c. 49, entitled to make a sale of the railway; that a deed purporting to make such sale would be ultra vires, and null and void; and on the further ground that the respondent was protected by the 11th section of the said Act.

This decree was affirmed by the Court of Queen's Bench.

Cohen, Q.C., and *Fullarton*, for the appellants, contended that Quebec Act, 43 & 44 Vict. c. 49, was valid, and intra vires of the Quebec Legislature. The Act fully authorized the deed of the 12th of August, 1881. Consequently, taking the Act and the deed together, and the breach of the covenant to pay interest, and the possession taken by the appellants under the provisions of the deed, the effect was to vest both the legal title and the right of possession and the actual possession in the appellants. Sect. 11 of the Act did not invalidate the appellants' right of possession and actual possession, nor entitle the sheriff to dispossess them. Consequently, at the date of the seizure of the railway by the sheriff, it was not "the property of the debtor in the possession of such debtor" within the meaning of Civil Procedure Code, sect. 553, and the seizure was super non domino et non possidente.

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Reference was also made to Quebec Act, 36 Vict. c. 51, which effected the amalgamation of two railways and formed the corporation to which the amalgamated railway in suit belonged, as not invalidating the appellants' right, and as not entitling the sheriff to dispossess them. Lastly, it was contended that the respondent, as an ordinary judgment creditor of the railway company, was not entitled to seize and sell the railway either with or without the franchise of the company. Reference was made to Civil Code Procedure, sects. 553 and 632; *Gardner* v. *London, Chatham, and Dover Railway Company* (1); *In re Bishop's Waltham Railway Company* (2); *Corporation of the County of Drummond* v. *South-Eastern Railway Company* (3). Canada Act 46 Vict. c. 24 does not apply to this particular railway.

Irving, Q.C. (Canada), and *Jeune*, for the respondent, contended that the deed of the 12th of August, 1881, did not transfer the ownership of the railway: it only gave the trustees a power as mortgagees to collect tolls and profits. Anything beyond that was not authorized by 43 & 44 Vict. c. 49. And by sect. 11 of that Act the rights of the respondent, who had instituted the action upon which they recovered judgment before the passing of the Act, were saved. The judgment obtained by the respondent effected hypothecation of the debtors' property in their favour: see Civil Code, art. 2034. Further, a railway can be sold in execution against the railway company. In consequence of the *Drummond Case* (3) that view was accepted by the Courts and by the public; consequently the point was not made by the appellants in the Courts below. 46 Vict. c. 24, applies to this railway: see sects. 121 and 6. All railways are in the category there mentioned, and therefore all railways are withdrawn from the local legislature, and are governed by the Dominion. The course of legislation in Canada has been different from what has prevailed in England. Reference was made to 36 Vict. c. 51, s. 2.

Fullarton replied.

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 2 Ch. 382.
(3) 22 L. C. Jur. 25; S. C. 24 L. C. Jur. 276.

1888. Feb. 15. The judgment of their Lordships was delivered by

LORD WATSON:—

The respondent corporation became subscribers for stock in the Richelieu, Drummond, and Athabaska Counties Railway Company, which was incorporated by the Quebec Act, 32 Vict. c. 56, under an agreement by which the company undertook to construct their line of railway so that it should pass through the municipality of the township of Wickham. By a provincial Act passed in the year 1872 (36 Vict. c. 51), the undertaking of the Athabaska Company was amalgamated with that of the South-Eastern Counties Junction Railway Company, and a new corporation formed, under the name of the South-Eastern Railway Company. The whole real and personal estate of the two companies was transferred to the new corporation, subject to the proviso that the rights and remedies of municipalities and other creditors, or of bondholders having mortgage on the real estate of either company, should remain unimpaired, but that liabilities arising from tort, as contradistinguished from the separate debts and obligations contracted by either company, were to attach only to the assets of the wrongdoing company, existing at the time when the Act came into operation.

In virtue of the powers conferred upon it by the Act of 1872, the South-Eastern Company issued bonds or debentures hypothecating, (1) the Athabaska Railway, which formed the northern section of its undertaking, to the amount of $150,000, (2) the Southern Counties Junction Railway, forming the southern section, to the amount of $750,000, and (3), the United Railway (which includes both sections) to the amount of £640,000 sterling. In the year 1880 the whole of the northern section bonds, and the greater part of the southern section and united railway bonds were still outstanding, and the earnings of the company were insufficient to pay the arrears of interest then due. In these circumstances the legislature of Quebec passed an Act (43 & 44 Vict. c. 49), which received Her Majesty's assent on the 24th of July, 1880, giving effect to the terms of an arrangement between the company and its bondholders for the issue of new bonds, to carry a first mortgage and charge upon the entire undertaking, in substitution for the outstanding bonds already mentioned.

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By that Act the company was authorized to issue mortgage bonds, at the rate of $12,500 per each mile of railway constructed or to be constructed, up to a limit of $2,000,000; and, for securing the due payment thereof with interest, to convey its entire property, including its franchise, to trustees in trust for that purpose. It was made lawful to insert in the trust conveyance stipulations as to who should have the possession and control of the franchise and other property conveyed; and, in the event of default in payment of the bonds, or of any of the coupons thereto attached, for divesting the company of all interest, equity of redemption, claim, or title in the said franchise and property, and vesting the same absolutely in the trustees. Sect. 5 empowered the trustees, when and as often as default should be made, to take possession of and run, operate, maintain, manage, and control the said railway and other property conveyed to them as fully and effectually as the company might do the same." The conveyance, when executed, was (sect. 7) declared to be to all intents valid, and to have the effect of creating a first lien, privilege, and mortgage upon the railway and other property thereby conveyed.

In pursuance of the Act of 1880, the company issued new mortgage bonds; and, on the 12th of August, 1881, executed a relative conveyance in trust, which contains a covenant entitling the trustees to enter into possession if default shall be made and continue for ninety days; and a further covenant for divesting the company, in certain events, of all interest, equity of redemption, and claim or title, as in the Act provided. On the 5th of October, 1883, interest on the mortgage bonds being more than ninety days overdue, the company, on the requisition of the trustees, and in compliance with the terms of the conveyance, gave them possession; and the trustees have since continued to maintain, work, and manage the railway, on behalf and at the expense of the bondholders, and have received the tolls and other profits of the undertaking. The appellants are now the acting trustees under the conveyance.

Neither the Athabaska Company nor the South-Eastern Company (to whom its contract obligations were transferred by the Amalgamation Act of 1872) carried any part of their lines of railway through the municipality of the township of Wickham. In respect of that breach of agreement, the respondents, on the

17th of July, 1880, just seven days before the Act 43 & 44 Vict. c. 49, became law, brought an action of damages before the Superior Court of Quebec against the South-Eastern Company, in which they obtained a judgment, now final, for the sum of $22,280, on the 29th of January, 1883. Upon the 6th of November, 1883, a writ of fi. fa. de bonis et terris, was issued; and, on the 19th of that month, the sheriff seized in execution and proceeded to advertise for sale the whole of the South-Eastern Company's railway, including both sections thereof, together with all the lands of the company and buildings erected thereon, as well as the rolling stock and other appurtenances of the railway, which are immeubles according to the statute law of Quebec.

The appellants then filed their opposition afin de distraire, their main ground of objection being that art. 553 of the Procedure Code only authorizes the seizure of immoveable property of the judgment debtor, which is in the possession of such debtor, whereas the railway seized was neither the property, nor in the possession of the South-Eastern Company. Their Lordships do not doubt that the effect of the trust conveyance of the 12th of August, 1881, followed by possession in terms of the deed, was to vest the property of the railway and its appurtenances in the appellants, and to reduce the interest of the South-Eastern Company to a bare right of redemption. In these circumstances, whatever might be his rights against the interest remaining in the company, the property of the railway could not be attached by any judgment creditor of the company who was affected by the provisions of 43 & 44 Vict. c. 49. But sect. 11 of that Act expressly provides that nothing therein contained shall in any manner affect suits then pending in any court of law; and the respondents are within the exception, because the action in which their decree was obtained was actually in dependence at the time of its passing. It was argued for the appellants that the exception is limited to suits during their dependence, and does not apply to proceedings taken in execution of a judgment after the suit is at an end. That construction of the clause would deprive it of all meaning. None of the provisions of the Act could by possibility affect the conduct of a suit instituted against the

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South-Eastern Company, although they are calculated to impair the plaintiff's recourse against its property after he has obtained a decree. According to the provisions of the Civil Code (art. 2034), a judgment ordering payment of a specific sum of money carries a hypothec upon the real as well as upon the moveable estate of the debtor; so that, apart from the provisions of the Act of 1880, the respondents' judgment against the South-Eastern Company made the principal sum decreed, with interest and costs of suit, a charge upon the railway, enforceable in terms of law.

In the course of the argument, the appellants maintained that the sheriff's seizure ought to be annulled, and proceedings stayed, on the ground that the railway, assuming it to be the property and in the possession of the company, was not liable to attachment for judgment debts of the company. That plea does not appear to have been taken, or discussed, in either of the Courts below; but, seeing that it involves considerations of public interest, and is sufficiently raised by the proceedings submitted to them, their Lordships conceive that they are bound to dispose of it.

The appellants relied upon the authority of *Gardner* v. *London, Chatham, and Dover Railway Company*, (1) and *In re Bishop's Waltham Railway Company* (2). These cases, which were decided by Earl Cairns (then Lord Justice) and Lord Justice Turner, establish conclusively that, in England, the undertaking of a railway company, duly sanctioned by the legislature, is a going concern, which cannot be broken up or annihilated by the mortgagees or other creditors of the company. The rule thus settled appears to rest upon these considerations,—that, inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties, and obligations from a railway corporation to any other person, whether individual or corporate, it would be contrary to the policy of the legislature, as disclosed in the general railway statutes, and in the special Acts incorporating railway companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or of preventing its completion.

(1) Law Rep. 2 Ch. 201. (2) Law Rep. 2 Ch. 382.

A different result was arrived at by the Court of Queen's Bench for Lower Canada in *Corporation of the County of Drummond* v. *South-Eastern Railway Company* (1). In that case the corporation, who were the holders of a bond issued to them by the Richelieu, Drummond, and Athabaska Railway Company, before the amalgamation, obtained judgment against the South-Eastern Company, and proceeded to take in execution, with a view to sell, a section of their railway. The judge of the superior Court quashed the proceedings, on the ground that the railway of a company incorporated by statute could not be seized in execution of a judgment, or sold at a sheriff's sale; but his decision was reversed by a majority of the Queen's Bench, who (Tessier, J., *dissentiente*) allowed the sale to proceed. Apparently, the Court did not in that case require to consider whether a judicial sale could have been permitted of such part of the railway property as would necessarily have had the effect of breaking up the undertaking, or of resolving it into its original elements. Mr. Justice Cross said (2):— "I can see no serious cause to apprehend that a change of proprietorship would interfere with the obligations which the road owes to the public, and which the general laws affecting railroads impose on whomsoever holds it. Should it pass into the hands of individual proprietors, it is nevertheless to a great extent subject to the general laws enacted for the government, control, and inspection of railways."

These observations strongly suggest that the legislation which the Court of Lower Canada had to consider, in that case, differs in material respects from legislation upon the same matters in this country. The learned judge was speaking, in the year 1879, with reference to provincial statutes, which it is now unnecessary to examine, because the undertaking of the South-Eastern Company had become a Dominion railway before the respondent's writ of fi. fa was issued. Sect. 92 (10 c.) of The British North American Act, 1867, excludes the authority of provincial legislatures in regard to local works and undertakings which are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada. On the 25th of May an Act was passed by the Dominion Parliament

(1) 24 L. C. Jur. 276. (2) 24 L. C. Jur. 289.

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(46 Vict. c. 24), further to amend the Consolidated Railway Act, 1879, and to declare certain lines of railway to be works for the general advantage of Canada; and the enumeration of these lines in sect. 6 includes the whole system of the South-Eastern Company, which is connected with the Grand Trunk Railway. Sect. 14 of the same Act provides that "if at any time any railway or any section of a railway be sold under the provisions of any deed of mortgage thereof, or at the instance of the holders of any mortgage bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and be purchased by any person or corporation not having any corporate powers authorizing the holding and operating thereof," the purchaser must, within ten days from the date of his purchase, transmit to the Minister of Railways and Canals an intimation of the fact, describing the termini and line of route of the railway, and specifying the charter under which it had been constructed and operated. Sect. 15 provides that, until such intimation has been made and all information furnished which the minister may require, it shall not be lawful for the purchaser to operate the railway; but that he may thereafter continue, until the end of the then next session of the Parliament of Canada, to work the railway and to take tolls, upon the terms and conditions of the previous owner's charter, unless these are varied by a letter of licence, which the minister is authorized to grant. Sect. 15 makes it the duty of the purchaser to apply to Parliament, during the next session after the purchase, for an Act of Incorporation or other legislative authority to hold, operate, and run the railway. If the application proves unsuccessful, it is in the discretion of the minister to extend his licence until the end of the next following session of Parliament, and no longer. Should the purchaser, during the extended period, fail to obtain an Act of Incorporation or other legislative authority, then the railway must be closed, or otherwise dealt with by the Minister of Railways and Canals, as shall be determined by the Railway Committee of the Privy Council.

Comment upon these enactments would be superfluous. They do not suggest that, according to the policy of Canadian law, a statutory railway undertaking can be disintegrated by piecemeal

sales at the instance of judgment creditors or incumbrancers; but they clearly shew that the Dominion Parliament has recognised the rule that a railway or a section of a railway may, as an integer, be taken in execution and sold, like other immeubles, in ordinary course of law. They justify the statement of Chief Justice Dorion, in the present case, that "it is now well settled by the jurisprudence prevailing in this country, and recognised by the Act 46 Vict. c. 49, that a railway can be seized and sold for the debts of the company who owns such a railway."

For these reasons, their Lordships have come to the conclusion that their judgment must be for the respondents. They are not affected by the Act of 1880, and must, therefore, be placed in no worse, and at the same time, in no better position than they would have occupied if the Act had never passed. On the one hand, the railway taken in execution by the respondents must, for all the purposes of these proceedings, be deemed to be still the property and in the possession of the South-Eastern Railway Company; and, on the other hand, the appellants, as representing the present holders of mortgage bonds, must be taken as standing in the shoes of the bond holders whose debts were unpaid at the passing of the Act. The appellants will be entitled, in the present proceedings, to the benefit of all rights and preferences which were attached to these mortgage debts during their subsistence.

Their Lordships will accordingly humbly advise Her Majesty to affirm the orders appealed from, and to dismiss the appeal. The costs of this appeal must be borne by the appellants.

Solicitors for appellants: *Hewlett & Preston.*
Solicitors for respondent: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

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Feb. 1, 2;
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THE MAYOR AND COUNCILLORS OF THE BOROUGH OF PIETERMARITZBURG . } PLAINTIFFS;

AND

THE NATAL LAND AND COLONIZATION COMPANY . . . . . } DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

Law of Natal—Private Act of August 3, 1866—*Encroachment—Remedy—Jurisdiction of the Court.*

In an action brought by the appellant corporation under sects. 60 and 64 of the Municipal Corporations Act, 1872, to compel the respondent company to remove portions of certain buildings which, by virtue of a survey authorized by a private Act relating to the corporation and dated the 3rd of August, 1866, must be deemed an encroachment on the street:—

Held, that the right of resort to the ordinary Courts of Justice was according to the manifest intention of the law of 1866, excluded in reference to all questions resulting from such survey being made binding and conclusive. All such questions must by the terms of the private Act be referred to a Court of Arbitration established thereby. The Act, however, did not apply to future encroachments, nor to encroachments already existing independently of such survey, on the face lines of streets as laid down by the corporation under an earlier Act of 1862.

APPEAL by the plaintiffs from a decree of the Supreme Court (March 11, 1884), so far as it declared the defendant to be entitled to compensation and referred the amount thereof to the Court of Assessors under a private Act of 1866, and from subsequent orders of the Supreme Court, dated the 6th of September, 1884, and the 31st of March, 1885.

Cross appeal by the defendant against the interlocutory orders of the Supreme Court, dated the 22nd of November, 1882, and the 20th of March, 1883, and from so much of the said decree of the 11th of March, 1884, as declared the buildings and erections complained of to be encroachments and liable to removal.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

The above decree and orders were made in an action brought by the corporation of Pietermaritzburg against the respondent company.

The facts of the case and the proceedings in the suit are stated in the judgment of their Lordships.

The main question decided in the appeal was as to the right to maintain the action, having regard to the true construction of the private Act of 1866 and the procedure thereby prescribed.

Sir *Horace Davey*, Q.C., and *Arbuthnot*, for the appellants, contended that the corporation was entitled unconditionally to the relief prayed in the action. The respondent company was not entitled to any compensation in respect of its encroachments or of their removal, either at common law or under the statute. If it was entitled to compensation the Court should have assessed the amount, or if the Court chose to refer the same to the Board of Assessors it ought to have confirmed their award, and the order of the 6th of September, 1884, refusing so to do was erroneous and ought to be discharged. By the Court's refusal either to assess compensation itself or to confirm the award the appellants were left in this position, that they were declared entitled to the relief prayed, but the same was practically denied to them by the course which had been taken by the Court. Reference was made to the Municipal Corporations Act, 1872, sects. 60 and 64. The former is practically identical with sect. 58 of the repealed Act No. 21 of 1862. Sect. 13 of the Act of 1866 did not oust the jurisdiction of the Court to entertain or the right of the corporation to bring this action. By virtue of that section the corporation could take proceedings under the Act before the Board of Assessors or have recourse to the ordinary jurisdiction of the Court. It was not an action within sect. 14 of the Act which did prohibit actions to which it related. Under sect. 13 the remedies were concurrent.

Finlay, Q.C., and *Folkard*, for the respondent company, contended that the Court below ought to have held that this action under Act 19 of 1872 did not lie, at all events not till after the appellants had previously complied with the private Act of 1866.

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In effect the Court had by its later judgment allowed that contention, although by its order of the 22nd of November, 1882, the Court had overruled it. The appellants were by the true construction of the Act of 1866 restricted to seek their remedy and the adjudication of the questions raised in this case by the proceedings prescribed under that Act. That Act gave a special remedy which must be adopted, and not an alternative one at the option of the corporation. Reference was made to *Stevens* v. *Jeacocke*, a judgment of Erle, J. (1); *Reg.* v. *Lovibond* (2); *Handley* v. *Moffatt*, an Irish case (3). On the merits the encroachments complained of existed long prior to the Act of 1866 without interruption and with the acquiescence of the appellants' predecessors in office. Reference was made to *Gaskin* v. *Balls* (4); *Grahame* v. *Swan* (5); *Attorney-General* v. *Sheffield Gas Consumers Company* (6); *Corporation of Folkestone* v. *Woodward* (7).

J. C. 1888 *March* 10.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The parties to the litigation which has led to these appeals are the corporation of Pietermaritzburg and the Natal Land and Colonization Company, Limited. The company are the owners of two houses in Pietermaritzburg, fronting Church Street. The front walls of these houses project some inches beyond the line which must be taken to be the true boundary line of the street. Both houses have verandahs supported by posts which project still further into the street. In August, 1882, the corporation brought an action against the company, and by their declaration they asked for an order compelling the company to remove the projections, as being encroachments on the public highway. To this declaration the company delivered exceptions suggesting that the action was not maintainable, on the ground that the corporation ought to have proceeded under a private law passed by the Legislative Council of the Colony, and dated the 3rd of August, 1866. On the 22nd of November, 1882, these excep-

(1) 11 Q. B. (N.S.) 731.
(2) 19 W. R. 753.
(3) 21 W. R. 231.
(4) 13 Ch. D. 324.
(5) 7 App. Cas. 569.
(6) 3 De G. M. & G. 304, 323.
(7) Law Rep. 15 Eq. 159.

tions were overruled. The company then pleaded to the declaration. In their plea they made averments to the effect that before the passing of the law of 1866 the ground on which the alleged encroachments stood formed no part of the street, but was their own freehold property. And they repeated their objection to the jurisdiction of the Supreme Court.

On the 13th of January, 1883, the corporation delivered exceptions to this plea. On the 20th of March, 1883, the exceptions were allowed.

On the 3rd of January, 1884, the company delivered a counterclaim, claiming compensation in respect of the loss they would sustain by the removal of their buildings.

On the 24th of January, 1884, the action came on to be tried. The corporation relied on a plan of the city prepared by a Mr. Moodie in accordance with the law of 1866, and thereby made conclusive as to the boundaries of the streets in the city of Pietermaritzburg. The company offered evidence with a view of proving that, apart from the law of 1866, their title to the ground upon which the alleged encroachments stood would be unimpeachable. The Court, however, declined to admit the evidence, and in the result the following judgment was given on the 11th of March, 1884.

"It is declared that the erections in question are encroachments, and should be removed. But such erections are not to be removed until application for compensation has been made to the Court or Board established under the Act of 1866, and the amount of compensation has been fixed by that Court or Board. Costs to be mentioned after the said Board shall have decided."

Recourse was then had to the Court or Board established under the law of 1866, which is generally known as the Board of Assessors. Before the Board it was stated, on behalf of the corporation, that they had no wish to have the front walls of the houses removed, and that, having obtained a judgment that those walls were encroachments, they would be prepared to let them remain on payment of a nominal rent for such reasonable period as might be limited by the Board. But they asked the Board to fix compensation for the removal of the verandah posts, offering, at their own cost, to secure the verandahs by brackets.

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The company objected to the Board proceeding on that footing, upon the ground that it was not the question referred to them by the Supreme Court. The Board disallowed the objection. The representative of the company then withdrew, and the Board passed a resolution fixing a nominal rent in respect of the front walls of the houses, which they decided were not to be rebuilt or permanently repaired, and they also decided that the verandahs ought to be removed without compensation.

The corporation then applied to the Supreme Court for confirmation of the decision of the Board. On the 6th of September, 1884, the Court refused the application with costs, and remitted the case to the Board for rehearing.

The Board met again in March, 1885, to consider the question. The company were willing that the Board should act, if they confined themselves to acting as referees under the order of the Supreme Court. The corporation contended that the functions of the Board were not to be so limited. After some discussion, the Board passed a resolution expressing their opinion that they could not be called upon to give an award without going fully into the details of the case brought before them, and that they could not be called upon by the Supreme Court to fix the amount of compensation in any particular case, when perhaps they might arrive at the opinion that no claim for compensation was established. Thereupon the corporation applied to the Supreme Court for a ruling upon this resolution, or, in the alternative, for a judgment that the previous decision of the Board might be confirmed. This application was refused with costs on the 31st of March, 1885.

In May, 1885, the company applied to the Supreme Court, asking that a notice by the corporation calling a meeting of the Board might be cancelled, and that the Supreme Court would themselves proceed to assess compensation. This application was also refused with costs.

On the 1st of June, 1885, the Board again met to consider the question, but on the objection of the company they again declined to proceed with the case.

Matters having thus come to a dead lock, the corporation applied for and obtained special leave to appeal to Her Majesty.

They appealed against the latter part of the judgment of the Supreme Court of the 11th of March, 1884, and also against the orders of the 6th of September, 1884, and the 31st of March, 1885.

Thereupon the company also applied for special leave to appeal, and they have appealed, against the first part of the judgment of the 11th of March, 1884, and against the interlocutory orders of the 22nd of November, 1882, and the 20th of March, 1883.

The principal question argued before their Lordships was whether the corporation were bound to proceed under the law of 1866 in respect of the alleged encroachments. That question must be determined by a consideration of the language of the statute and of the intention of the legislature, to be collected from the statute itself.

The law of 1866 states in the preamble at some length the circumstances which led to its being passed, and the object of the legislature in passing it. It recites that much confusion and uncertainty had arisen with reference to the true boundaries and extents of various blocks and other plots of lands or subdivisions thereof within the city of Pietermaritzburg, in consequence of erroneous or conflicting surveys of the same, and from the absence of duly marked and legally appointed beacons, and from various encroachments on some of the streets, roads, and public ways, and on the blocks, lots, erven, or other subdivisions thereof, and that it had, therefore, become necessary to provide measures for remedying the same. It then states that, with a view to such object, the council of the corporation had recently caused a general re-survey to be made by Government Surveyor Moodie, assisted by Government Surveyor Mair, and that the council thereupon caused to be prepared a general plan of the city, which was filed in the office of the town clerk, and a copy of which was also filed in the office of the Surveyor-General of Natal, and that it was desirable that such plan should for the purposes aforesaid be established as the recognised general plan of the city.

The preamble then proceeds as follows:—

"And whereas from such above referred to causes various blocks, lots, or erven, and other existing divisions of said lands

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have been found on such re-survey to be incorrect and erroneous, and in many instances to exceed the extent of land specified in the diagrams and titles thereof, and in other instances the assumed boundaries of such blocks or divisions are found to overlap each other or encroach on the streets or public ways of the said city.

"And whereas much injury and inconvenience have been occasioned, and probable litigation is likely to arise, if these excesses of extent or area and irregularities or defects and such uncertainty of boundaries and other evils are not satisfactorily and summarily dealt with and remedied, and it hath therefore become expedient to confer upon the said Council, assisted by other qualified assessors or other legally constituted authorities, certain powers and jurisdiction for the arbitration and adjudication of, and for the purpose of determining and settling, all questions respecting any such boundaries of the said streets or other public ways and blocks and other divisions aforesaid, and to provide, if occasion shall arise, for the awarding a fair compensation in regard thereto."

So far, the intention of the Act is plain. There had been much confusion of boundaries. In some cases, at any rate, the confusion had arisen, not from any fault of the owners or occupiers, but from the inaccuracy of official surveys and Government grants. The corporation had caused a general re-survey to be made. There is no suggestion on the face of the Act that in making the re-survey there had been any investigation of private titles. An investigation of that sort would have been beyond the power of the corporation. To publish the re-survey, unless it were made binding and conclusive, would only add to the confusion. To make it binding and conclusive, without providing some equitable means of dealing with the questions it would necessarily provoke, would be unjust and arbitrary in the highest degree. In some cases it might be sheer confiscation. The preamble points out that the matter was one which must be "satisfactorily and summarily" dealt with. And so it declares it to be expedient to appoint a Court of Arbitration for the purpose of settling "all questions"—not merely questions between adjoining owners, but all questions respecting boundaries of

streets and public ways, as well as respecting boundaries of blocks and other divisions of land. The proposed Court was to be the Council of the Corporation, assisted by duly qualified assessors, and it was to have the power of awarding compensation if occasion should require it.

The Act then proceeds to carry out its declared purpose. Moodie's plan is declared to be the recognised and established general plan of the city, sect. 1. The blocks and other divisions of land marked on the plan and ascertained by the re-survey are to be deemed the correct and true sites of the blocks and other divisions of the city lands, sect. 2. Two members of the council to be elected by the council annually in conjunction with the mayor, and three assessors appointed by the Governor are to form a Court "for the equitable adjustment, determination, and decision of all disputes and differences between the proprietors and owners and purchasers and lessees of any such blocks, lots, erven, or other subdivisions of the said lands in regard to the true and proper boundaries, extent, or area thereof," sect. 4.

The Court is empowered to entertain and arbitrate upon all disputes and differences relating to the matters aforesaid that may be submitted to it for decision, sect. 5. Evidence is to be taken in writing, and all witnesses and holders of documents are to be examined on oath in accordance with the law of evidence in the colony, sect. 8. In all cases in which it adjudicates the Court is to have power, where buildings are already erroneously or wrongfully erected according to the re-survey, to adjudge the land on which the buildings stand to the owner of the buildings in fee or for a term at a fair value or rent for the extent of land occupied thereby, and the award of the assessors may be confirmed and performance thereof decreed by the Supreme Court on the application of any of the parties, sect. 9. If the Supreme Court does not think fit to confirm the award it may remit it to the Court of Assessors for reconsideration and amendment, or for such other order as the circumstances of the case may warrant, sect. 11. No suit or action is to be maintainable by any owner or lessee on the ground of alleged trespass by any owner or lessee of any adjoining lot or for subdivision until the first-mentioned owner or lessee has referred the matter to the Court of

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Assessors and the Court has decided as provided by the Act, sect. 14.

All these provisions relate to disputes and differences between adjoining owners and lessees. The only section which relates to encroachments on the public streets and highways of the city is sect. 13, which is in the following terms:—

"In all cases of encroachment of buildings on the streets or public ways of the said city or borough by projections on the true lines thereof (not dealt with by the corporate council under the provisions of sect. 58 of the Corporate Law, No. 21, 1862), it shall be competent for the said council to have the same dealt with and adjudicated under this law as and when the said council may think fit, upon due notice, in accordance with the provisions of the preceding clause, of any such intent given to the owner, or claimant, or proprietor thereof."

The first question seems to be what is the meaning of the parenthesis, "not dealt with by the corporate council under the provisions of sect. 58 of the Corporate Law, No. 21, 1862." Now the law of 1866 was not intended to provide for future encroachments. It deals once and for all with a state of circumstances called into existence by the application of Moodie's plan to the blocks and divisions of land as they were actually enjoyed, and to the streets and highways as they were actually used at the time of the passing of the law. It seems, therefore, that the expression, "not dealt with" must likewise refer to a state of things existing at the time of the passing of the law, and must mean "not already dealt with." On turning to sect. 58 of the law of 1862, which is now represented by sects. 60 and 64 of the Municipal Corporations Law, 1872, it will be found that it relates to two matters, (1) the prevention and abatement of nuisances, (2) the regulation of buildings, to which there is incident a power "to define and lay done the face lines of streets." In the catalogue of nuisances, "the obstruction of any highway" is mentioned. But, having regard to the subjects with which it is associated, which are matters, speaking generally, of police regulation, the expression refers, apparently, to obstructions of a temporary character. It seems to their Lordships that the object of the parenthesis was merely to exclude from the consideration

of the Board of Assessors those cases in which, at the time of the passing of the law of 1866, there were encroachments on the face lines of streets, as laid down by the council under the powers of sect. 58. Their Lordships cannot agree with Mr. Justice Williams in his judgment of the 20th of March, 1883, where he observes that the meaning is that the power of adjudication conferred on the Board of Assessors "may only be exercised when the council does not elect to proceed under its own powers."

On the main question, it was urged on behalf of the corporation that the law of 1866 makes Moodie's plan conclusive for all purposes, that sect. 13 gives them the option of applying to the Board of Assessors, but that there is nothing in the law of 1866 to oust the jurisdiction of the Supreme Court. On the other side it was contended that under the circumstances it was incumbent upon the corporation to proceed under the law of 1866.

Their Lordships think that the contention on the part of the company is well founded. The meaning of the legislature, as declared in the preamble of the law, is clear beyond dispute. All questions arising out of the resurvey were to be referred to a Court of Arbitration armed with equitable jurisdiction. It was said by the appellants, and it was scarcely disputed by the respondents, that the ordinary Courts of the Colony being bound by Moodie's plan have no power to award compensation. In these circumstances, to give the corporation the right to select their tribunal would in effect be a warning against arbitration. Why should they take a course which must, or may, throw a charge on the rates? But how does the matter stand from the point of view of an owner of buildings intersected by the line of a street as laid down on Moodie's plan? If the view of the appellants be correct the rightful owner of yesterday becomes a trespasser and a wrongdoer on the passing of the Act. He is at the mercy of the corporation. He is at the mercy of any private individual who may be entitled to complain of his building as an obstruction to the highway. In his case the solemn appointment of a Court of Arbitration which the council of the corporation are free to accept or to decline seems to be nothing short of a mockery, and not the less so because the council were themselves the promoters of the law of 1866, and the language of the

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preamble, with its promise of satisfactory settlement and fair compensation, is their language. Moreover, if the view of the appellants be correct the Supreme Court itself is placed in a singular position. Applied to directly to give effect to Moodie's plan they have no discretion. They cannot listen to equitable considerations. They cannot award compensation. They have nothing to do but to condemn a building which transgresses the prescribed line. Applied to in the case of the very same building to give effect to Moodie's plan by confirming the award of the Board of Assessors, they have a discretion as wide as that of the Board, and complete control over the proceedings of that tribunal. It is true that the right to have an obstruction in a public highway removed is not a new right. Yet in a sense, and in a very substantial sense, the rights given by the law of 1866 are new. By that law the legislature provided a framework on which the extent and area of all blocks and divisions of private property, and the lines of all streets within its ambit, were to be measured and tested. To this measure and test private owners must submit and conform "as and when the said council may think fit." The right to use an instrument, so simple and at the same time so potent, sweeping away at one stroke defences otherwise unassailable, may properly be regarded as a new right. It seems to follow from these considerations that if this new right is to be enforced the special and appropriate remedy provided by the legislature must be pursued.

The form of expression used in authorizing the council of the corporation to resort to the Board of Assessors, "it shall be competent for the said council," is probably due to the circumstance that the council are themselves represented on that tribunal. Without statutory authority it would not be competent for them to act as judges in their own cause. The language which authorizes them to apply to the Board seems to point also to the removal of a disqualification on the part of the tribunal.

Their Lordships do not intend to depart from the rule that, in the construction of a statute, the ordinary meaning of the words used must be adhered to unless that meaning is at variance with the intention of the legislature to be collected from the statute itself, or leads to some absurdity or repugnance. In this case

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they think that the manifest intention of the law of 1866, as collected from the statute itself, does, by necessary implication, exclude the right of resort to the ordinary Courts of Justice in the Colony.

Their Lordships will humbly advise Her Majesty that the exceptions overruled by the order of the 22nd of November, 1882, ought to be allowed, and the action dismissed, and that the corporation should pay the costs of the company in the Court below up to and including the hearing of the action. Their Lordships will not recommend Her Majesty to interfere with the costs of the proceedings in the colony subsequent to the hearing. The sum of £300 deposited by the company as security for costs should be repaid to them. The corporation must pay the costs of these appeals, except so far as they may have been increased by the supplemental case lodged by the corporation.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondents: *Harries, Wilkinson, & Raikes.*

[PRIVY COUNCIL.]

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CHARLES TENNANT, SONS & Co. . . APPELLANTS;

AND

HOWATSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD.

Law of Trinidad—Ordinance No. 15 *of* 1884—*Bill of Sale of growing Crops—Registration.*

Held, that a bill of sale of crops actually growing at the date of its execution is void for want of registration under Trinidad Ordinance, No. 15 of 1884.

The words in sect. 10 "nothing contained in this Ordinance" mean "nothing contained in the two next preceding sections of this Ordinance."

APPEAL from an order of the Supreme Court sitting in bankruptcy (Nov. 2, 1886), dismissing with costs a motion made by the appellants in the matter of Joseph Leon Agostini and Lucien

* *Present:*—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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François Ambard, bankrupts, of whose estate the respondent had been appointed trustee.

By their notice of motion the appellants sought (in effect) to enforce an instrument in writing dated the 13th of November, 1885, whereby Messrs. A. Ambard & Son, of Trinidad, a firm in which the bankrupts were partners, charged and assigned to the appellants the sugar canes then growing on the St. Augustin estate in Trinidad, for the purpose of repaying to the appellants a sum of £30,000 advanced by them to the said A. Ambard & Son. The motion was dismissed by the order of the 2nd of November, 1886, on the ground that the instrument in writing was invalid; as being a bill of sale within the meaning of the Trinidad Bills of Sale Ordinance No. 15 of 1884, and therefore void for non-compliance with the requirements of that Ordinance.

Sir *Horace Davey*, Q.C., *Cozens-Hardy*, Q.C. (*Sebastian*, and *Lyttelton*, with them), for the appellants, submitted that the instrument of the 13th of November, 1885, was not a bill of sale within the definition of the Ordinance. The evidence shewed that it was a transfer of goods in the ordinary course of business of a class which is excluded from the operation of the Ordinance: see the interpretation clause. It was not a bill of sale, but an agreement known as a working agreement, which it was not the practice to register under the Ordinance. Reference was made to *Ex parte North Western Bank, In re Slee* (1); *Ex parte Close, In re Hall* (2); *Langton* v. *Waring* (3); *Ex parte National Mercantile Bank, In re Phillips* (4); *Swainston* v. *Clay* (5); *Holderness* v. *Rankin* (6). They then contended that if a bill of sale governed by that enactment it fell within the scope of sect. 10, by force of which bills of sale relating to growing crops are taken out of the Ordinance and would not require registration. The instrument in question was given for valuable consideration, and the sugar into which the growing crops had been converted, was not in the order or disposition of the bankrupts, but of the firm to which the bankrupts belonged. Moreover, the evidence shewed that the fact of the produce of a Trinidad plantation being left

(1) Law Rep. 15 Eq. 69.
(2) 14 Q. B. D. 386.
(3) 18 C. B. (N.S.) 315.
(4) 16 Ch. D. 104.
(5) 3 De G. J. & S. 558.
(6) 28 Beav. 180.

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in the possession of the proprietor of the plantation during the usual shipping season, would not add to the credit of such proprietor in any way. Such produce is not in the order and disposition of the proprietor for the purpose of the bankruptcy Ordinance. [LORD WATSON referred to *Colonial Bank* v. *Whinney* (1).]

Rigby, Q.C., *Finlay*, Q.C. (*C. James*, with them), for the respondents, contended that the bill of sale in question was void for want of registration. It conferred no title on the appellants. It was a mortgage bill of sale within the meaning of the Ordinance, and being neither attested nor registered it failed to comply with the requirements of sect. 11. As to its being taken out of the Ordinance by virtue of sect. 10, it was contended that the true construction of that section was to limit the exception contained therein to cases in which a bill of sale would otherwise be void in certain respects for non-compliance with either of the two sections immediately preceding. The construction placed upon this section by the Chief Justice was right. The exception did not apply to sect. 13. Further, sect. 10 could in any view only apply to that part of the instrument which related to growing crops. When those growing crops had been converted into sugar by the lawful act of A. Ambard & Son, the claim to the sugar resulted from that portion of the letter which related to sugar, which portion was clearly a bill of sale relating to ordinary chattels to which sect. 10 did not apply. Reference was also made to the Bankruptcy Ordinance, 1871, sect. 14.

Cozens-Hardy, Q.C., replied.

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The judgment of their Lordships was delivered by LORD HOBHOUSE:—

The question to be decided in this appeal turns entirely on the construction of the Trinidad Ordinance No. 15 of 1884 relating to bills of sale. The material facts are few and are not in dispute.

The respondent is the trustee appointed in the bankruptcy of

(1) 30 Ch. D. 261; see also 11 App. Cas. 426.

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Joseph Leon Agostini and Lucien François Ambard. These two gentlemen carried on business in Trinidad as growers of sugar, in partnership with John Bell Smyth, under the firm of A. Ambard & Son. The appellants are London merchants who had dealings with A. Ambard & Son.

On the 13th of November, 1885, an agreement was made between the appellants and A. Ambard & Son, in the form of a letter addressed by the latter firm to the former, the first paragraph of which runs as follows:—

"In consideration of your accepting our drafts now on the way for £11,000, and of you agreeing to our postponing the remittance to you of £19,000, the estimated net proceeds of rice paid for by you and sent by you to us for sale on joint account as regards profits and loss, making together £30,000, we hereby charge and assign to you the canes now growing on the several estates now held with and known as the St. Augustin estate, in Trinidad, comprising about 2154 acres, and we agree to cultivate, reap, and manufacture at our own cost, and ship to your order from time to time, as soon as manufactured, all the sugar produced from the canes on this estate, and all the sugar we may manufacture from canes we may bring to and grind at the St. Augustin factory; you to sell the same, and to apply the net proceeds after deducting costs of insurance, freight, charges, commission, and brokerage, to the repayment of the beforementioned £30,000."

The rest of the letter made other provisions relating to the proceeds of the crop of 1885, and provisions of a like kind with respect to the crop of 1886.

On the 9th of July, 1886, Agostini and Ambard were adjudicated bankrupt. At that time the crop of 1885 had been cut and made into sugar, and it is this sugar which is claimed by the appellants against the trustee.

The trustee does not claim the sugar as being in the order and disposition of the bankrupts, because it was in the hands of A. Ambard & Son, and the bankrupts are only two of the partners in that firm. But he contends that the letter is a bill of sale, not registered, and that for want of registration it cannot pass any property to the appellants.

The Ordinance in question, with the exception of the interpretation clause, which is taken from the English Act of 1878, is copied from the English Act of 1882, with some variations, one of which gives rise to the principal difficulty in this case. The letter of November, 1885, is clearly comprised within the range of general transactions which the interpretation clause declares that the expression "bill of sale" shall include. And the first question is whether it also falls within one of the classes of special transactions which the same clause excludes.

It is contended that the transaction in question falls under the heads of "Transfers of goods in the ordinary course of business of any trade or calling," which are excluded from the operation of the Act. Several Trinidad merchants have made affidavits to shew that it is a common custom in Trinidad for the owner of a sugar estate to borrow money of a merchant for the expenses of getting the crop and making the sugar, upon an agreement to deliver to him the sugar when made, to sell on commission, and to retain his debt out of the proceeds. Such agreements, it is said, are known as working agreements, and are not usually registered as bills of sale.

But three of these witnesses who were cross-examined explained that working agreements are usually joined with, or subsidiary to, mortgages, evidently meaning mortgages of the estates; and one said that mortgages are the rule, and working agreements the exception. Though therefore the working agreement, standing alone, is of frequent occurrence, it cannot be said to be the common practice. And their Lordships doubt very much whether the special arrangement made by the letter of November, 1885, is such an advance for the purposes of the estate as to make it an ordinary working agreement.

If the evidence leaves it doubtful whether the agreement in question is a working agreement, and falls short of shewing that even a working agreement is the common practice in Trinidad, still further is it from shewing that the agreement is a transfer "of goods in the ordinary course of business." Their Lordships think that the word "goods" in this context does not include growing crops. The expression "personal chattels" is defined to mean "goods, furniture, other articles capable of complete

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transfer by delivery, and (when separately assigned or charged) fixtures and crowing crops." If it were not for this express definition growing crops would not be personal chattels, and the word "goods" is not at all calculated to include them. Moreover, though it is not easy to say with any precision all that is meant by the expression "the ordinary course of business," their Lordships are of opinion that it does not point to the borrowing of money on mortgage or special agreement, though such a thing may be frequent among certain classes of persons. And they are clear that an agreement such as has been made in this case is not (as to be withdrawn from the operation of the Act it must be) a document "used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

The other reason assigned for withdrawing this agreement from the Ordinance is that by sect. 10 it is declared that, "Nothing contained in this Ordinance shall render a bill of sale void in respect of any of the following things:—(1) Any crops separately assigned or charged when such crops were actually growing at the time when the bill of sale was executed; (2) any fixtures separately assigned or charged, and any plant or trade machinery, when such fixtures, plant, or trade machinery are . . . in substitution for any of the like fixtures, plant, or trade machinery specially described in the schedule to such bill of sale."

If an exact literal construction is to be given to this section, then sect. 11 of the Ordinance, which requires registration and in default of it avoids a bill of sale, must be taken not to avoid it in respect of crops actually growing at the date of the bill of sale. But then it will be found that nothing is left in the Ordinance capable of application to such crops, except possibly, and under very exceptional circumstances, sect. 17, which relates to personal chattels liable to distress for taxes, and provides that a bill of sale shall not protect them. It is impossible to suppose that for so trivial a purpose these growing crops would be brought under the definition of "personal chattels," which in their nature they are not. And nobody has been able to find any reason why

the legislature should frame an artificial definition for the purpose of treating separately assigned growing crops as personal chattels, of bringing them within the operation of bills of sale, and within the provisions requiring registration for a valid assignment of them, while after all the most important of such crops, the most likely to be assigned separately, viz., those growing at the date of the bill of sale, are to be wholly exempted from the policy of the law. Nor is it any easier to find a reason why substituted fixtures or plant should be so exempted.

This grave difficulty compels a close examination of the other sections of the Ordinance, to see if they can afford some clue to a construction of the words, "Nothing contained in this Ordinance," which, though only a secondary meaning, may yet be found on valid judicial grounds to be the true meaning of the framers of the law. And their Lordships think that such a clue is to be found on a careful comparison of sect. 10 with the two preceding sections and the succeeding one. Sect. 8 is as follows:—

"Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale, and such bill of sale, save as hereinafter-mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule, and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

Now what is the saving "hereinafter mentioned"? None is mentioned except the saving in sect. 10. Growing crops cannot be described more specifically in a schedule than they would be in the operative part of the instrument, and chattels not in existence cannot be specifically described at all. There is good reason for saving them out of that provision which requires specific description in a schedule, and saved they are accordingly. The salvo is satisfied by sect. 10, and by nothing else in the Ordinance, and sect. 10 is made sensible by reference to the salvo, and leads to strange consequences if extended beyond the salvo. There is then a strong inference that these two parts of the instrument were designed to fit one another.

The inference is strengthened by examining sect. 9, of which

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precisely analogous remarks may be made. It is in these terms:—

Sect. 9. "Save as hereinafter mentioned a bill of sale shall be void, except as against the grantor in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale."

This section too contains a salvo, which is explained and satisfied by sub-sect. (2) of sect. 10, and which is necessary because the grantor cannot at the time of the sale be the true owner of fixtures to be afterwards substituted. And the salvo refers to nothing else in the whole Ordinance.

It is also to be remarked that the expression "save as hereinafter-mentioned" occurs nowhere in the Ordinance except in the two sections just commented on. If sect. 10 were intended to exempt actually growing crops and substituted fixtures from the necessity of registration, it would be important to insert a salvo in sect. 11, which requires registration, and it would be a mere superfluity to insert it in sects. 8 and 9, which only deal with some subordinate parts of the thing to be registered. Yet we find it in sects. 8 and 9 where it is not wanted, and we do not find it in sect. 11 where it is much wanted.

We find then on the face of the Ordinance the following phenomena: that the literal construction of the opening words of sect. 10 makes it impossible to understand why growing crops should be mentioned at all; that, on the same construction, the words expressly saving bills of sale from provisions that make them void are not found where they ought to be, and are found where they need not be: whereas if sect. 10 is construed with reference only to the matter of the two foregoing sections, everything falls into its place; the express salvoes in sects. 8 and 9 are fully explained and satisfied, the reasons for the exemptions of sect. 10 become perfectly intelligible, and sect. 11 is properly framed without any saving clause. Their Lordships think that these considerations require them to construe sect. 10 as if it began with the words, "Nothing contained in the two foregoing sections of this Ordinance," or "nothing in this Ordinance which requires a schedule of personal chattels."

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The result of such a construction is that the assignment to the appellants is void for want of registration. As the decree appealed from is founded on the same conclusion, it should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to that effect, and the appellants must pay the costs of the appeal.

Solicitors for appellants: *Mark Shephard & Son.*
Solicitors for respondent: *Druces & Attlee.*

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Jan. 26, 27;
March 17.

GODFREY . . . . . PLAINTIFF;

AND

POOLE AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Voluntary Conveyance irrevocable—Subsequent Purchaser for Value—13 *Eliz.* c. 5—27 *Eliz.* c. 4—*New South Wales District Courts Act*, 1858, *ss.* 78, 79.

Where a debtor conveyed all his real estate upon trust to sell and pay off his debts, and as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, and after her decease in trust for their children in equal shares as tenants in common:—

Held, in a suit by a subsequent purchaser for value (at a sale in execution) of the grantor's interest in some lands comprised in the conveyance:—

(1) That the deed of conveyance was not revocable, there being an ultimate trust for the benefit of wife and children;

(2.) That it was not void as intended to delay or defeat creditors;

(3.) That, not being fraudulent in fact, it was not fraudulent in law and void against creditors under 13 Eliz. c. 5, no intention to delay or defeat creditors being shewn;

(4.) That it was not void under 27 Eliz. c. 4, as against a purchaser for value under New South Wales District Courts Act, 1858, sects. 78 & 79. The subsequent sale for value not being by the voluntary grantor, no presumption arose that the prior grant was fraudulent.

APPEAL from a decree of the Supreme Court (Feb. 26, 1884) whereby a decree of Faucett, J. (Aug. 9, 1883), was affirmed.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The suit was brought by the appellant to have it declared that upon the sale of certain lands by the registrar of the District Court of Sydney, and upon registration of the deed of conveyance, an indenture of settlement under which the respondents derived title became void as against the appellant, and further that the said indenture of settlement might as against the appellant and the creditors of the settlor if necessary be declared fraudulent and void by virtue of the statute 13 Eliz. c. 5, and for an injunction to restrain the respondents and their agents from selling or in any way dealing with or trespassing on the lands comprised in the said deed of conveyance, and for consequential relief.

The facts are stated in the judgment of their Lordships.

Kenelm Digby, for the appellant, contended, with reference to the deed of conveyance of the 30th of September, 1864, that in the first place it was a purely voluntary deed, and did not constitute the relation of trustee and cestui que trust between the so-called trustees and any creditor. No creditor executed the deed or was shewn to have assented to it, or to have adopted it by coming in under it. The trusts of the deed therefore were only revocable directions and were avoided by the subsequent sale to the appellant followed by registration. Reference was made to *Johns* v. *James* (1); *Garrard* v. *Lord Lauderdale* (2); *Walwyn* v. *Coutts* (3); *Acton* v. *Woodgate* (4); *Harland* v. *Binks* (5); *In re Cameron and Wells* (6); *Siggers* v. *Evans* (7). Secondly, the appellant was a bonâ fide purchaser for value, by virtue of the District Courts Act, 1858 (22 Vict. No. 18), sects. 78 & 79, and in consequence the conveyance of the 30th of September, 1864, became void as against him under 27 Eliz. c. 4. The leading case to settle the application of that statute is *Doe* d. *Otley* v. *Manning* (8); see also *Parker* v. *Wright* (9). The deed being void under that statute, the grantor had a saleable interest in

(1) 8 Ch. D. 744.
(2) 3 Sim. 1; 2 Russ. & My. 451.
(3) 3 Sim. 14.
(4) 2 My. & K. 492.
(5) 15 Q. B. (N. S.) 71
(6) 37 Ch. D. 32.
(7) 5 E. & B. 367
(8) 9 East, 59.
(9) 6 H. & N. 849.

the lands conveyed; see *Doe* d. *Newman* v. *Rusham* (1); *Beavan* v. *Earl of Oxford* (2); *Dolphin* v. *Aylward* (3); and this interest by force of the above-named statute passed to the appellant on the conveyance by the district registrar. Lastly, the deed, so far as regards the lands in question, was fraudulent and void as against the creditors of the grantor, including the appellant, under 13 Eliz. c. 5. See *Nunn* v. *Willsmore* (4). [*Cozens-Hardy* referred to *Alton* v. *Harrison* (5), where it was held that an assignment of this sort may be an act of bankruptcy but is not void against creditors.] See May on Voluntary Settlements, p. 15, referring to *Townsend* v. *Windham* (6); May, p. 35; *Freeman* v. *Pope* (7). As to what "indebted" means when a voluntary conveyance is in question, see *Townsend* v. *Westacott* (8). [*Cozens-Hardy* referred to *George* v. *Milbanke* (9).] [LORD WATSON:—You must shew an intent to delay or defeat creditors.] The authorities establish that the intent is sufficiently proved when it is shewn that the conveyance is voluntary, and made by a person so indebted as to be in embarrassed circumstances. The creditors are injured because there is no binding provision in their favour unless the relationship of trustee and cestui que trust is established between the trustees and the creditors, and that was not the effect of this deed, which at the same time deprives the creditors of their legal rights: *Hungerford* v. *Earle* (10) cited in *Nunn* v. *Willsmore* (4); *Ex parte Mercer, In re Wise* (11).

Cozens-Hardy, Q.C., and *Ingpen*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree of the Supreme Court of New South Wales, by which an appeal from a decree of Mr. Justice Faucett, the Acting Primary Judge in Equity, in a suit in

(1) 17 Q. B. (N. S.) 723; S. C. 21 L. T. (Q.B.) 144.
(2) 6 De G. M. & G. 528.
(3) Law Rep. 4 H. L. 486, 499.
(4) 8 T. R. 521.
(5) Law Rep. 4 Ch. 622.
(6) 2 Ves. Sen. 1.
(7) Law Rep. 5 Ch. 538.
(8) 2 Beav. 344.
(9) 9 Ves. 190.
(10) 2 Vern. 261.
(11) 17 Q. B. D. 290.

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which the present appellant was the plaintiff, was dismissed with costs.

The facts of the case, as found by Mr. Justice Faucett, are clearly stated in the reasons of the learned Chief Justice.

It is sufficient to state here that Francis Mooney, having obtained in 1856 three lots of land in the Colony by grants from the Crown, mortgaged them in 1863 to Adolphus William Young, to secure the sum of £350, with interest at the rate of 8 per cent. per annum. By the terms of the mortgage the mortgagee had an absolute power of sale in case of default. In the year 1864, Mooney, being largely indebted to his master, Mr. Lithgow, was induced, under pressure of Mr. W. W. Billyard, the solicitor of Lithgow, to execute a deed of the 30th of September of that year, by which he conveyed to the said Mr. W. W. Billyard and one William McMillan all his real estate upon trust to sell the same, and to pay off his mortgage and other debts, and as to the ultimate surplus of the said trust moneys and premises, after satisfaction of the said mortgage and other debts, in trust to pay over the same unto trustees to be named by Ellen Mooney, the wife of the said Francis Mooney, to be held by them in trust for the sole, separate, and inalienable use of the said Ellen Mooney for life, free from the debts, control, interference, or engagements of the said Francis Mooney, and after her decease in trust for the children of the said Francis Mooney and Ellen, his wife, in equal shares and proportions, as tenants in common. This deed was duly registered.

Very shortly after the execution of the deed the trustees, Billyard and McMillan, paid off Young's mortgage, and an acknowledgment bearing date the 20th of October, 1864, was indorsed by Young on the mortgage deed. So far as appears by the evidence in the suit, all Mooney's creditors were paid, except Mr. George Chisholm and Henry Rolfe, whose claims were, it seems, not known to the trustees at the time when they were dealing with Mooney's assets. In point of fact, the debt to Rolfe was not wholly due at the time of the execution of the deed of trust, that debt, amounting to the sum of only £18 0*s.* 3*d.*, having accrued between the 14th of March and the 7th of October, 1864. These two creditors each sued Mooney in the District Court, and

recovered judgments against him—the one for £51 6*s.* 3*d.*, and the other for £18 0*s.* 3*d.* Chisholm's judgment was obtained on the 6th and Rolfe's on the 7th of March, 1865. Execution was issued on Rolfe's judgment for debt, and costs, £28 6*s.* 2*d.*, and, on the 1st of April, 1865, the registrar of the District Court sold Mooney's interest in the said three pieces of land to Godfrey the plaintiff for the sum of £18 10*s.*, being £10 6*s.* 2*d.* less than the amount of the execution. On the 25th of April, 1865, the registrar executed a conveyance of Mooney's interest in the three plots of land to the plaintiff, who, on the 19th of September, 1865, obtained, in consideration of the sum of £2 10*s.*, an assignment of Rolfe's judgment debt to himself.

The three plots of land were, at that time, mere bush land, and the plaintiff never obtained actual possession thereof.

On the 2nd of October, 1882, seventeen years after his purchase, the plaintiff filed his statement of claim, in which he alleged that Mooney was, at the date of the indenture of the 30th of September, 1864, indebted to various creditors, and particularly to Rolfe and Chisholm; and that the said indenture was without valuable consideration, and was a fraud upon his creditors, and was also void as against the plaintiff as a subsequent purchaser for value. He charged that the legal estate did not pass by this indenture to Billyard and McMillan; and further, that, on the registration of the conveyance to him from the registrar of the District Court, the indenture of the 30th of September, 1864, became by virtue of the Act (27 Eliz. c. 4), and by virtue of the operations of the 78th and 79th sections of the District Courts Act of 1858, as against him, the plaintiff, void and of no effect, and that the legal and equitable estate in the land passed to him as a bonâ fide purchaser for value. He further charged that that indenture was, by virtue of the Act (13 Eliz. c. 5), void as against him as assignee of Rolfe's judgment, and also as against Mooney's creditors. He asked for a declaration to the effect that the defendants should be declared trustees for him, that they should be directed to convey to him, and that they should be restrained from interfering with the lands comprised in the said indenture.

It is unnecessary for the purpose of this case to state the

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manner in which the defendants derived their title. It is fully set out in the reasons given for the judgment of the Supreme Court, by which it is shewn, as stated by the Chief Justice, that they derived their title under the trust deed through a conveyance dated 17th of May, 1872, executed by the trustees and by Mooney and his wife to Jacob Marks.

His Honour the Acting Primary Judge dismissed the plaintiff's claim, with costs, and on appeal the full Court sustained that decision, and dismissed the appeal with costs.

The question now is whether the sale of Mooney's interest in the land under the execution on Rolfe's judgment, the conveyance executed by the registrar on the 25th of April, 1865, and the assignment of Rolfe's judgment to the plaintiff, vested in him any title to the land or the right, either as a creditor of Rolfe or as a purchaser for value, to treat the trust deed of the 30th of September, 1864, as fraudulent and void.

It was contended by the plaintiff's counsel, on the authority of *Walwyn* v. *Coutts* (1), and *Garrard* v. *Lord Lauderdale* (2), that Mooney's conveyance to Billyard and McMillan, in trust for his creditors, was a revocable instrument, which passed nothing to the trustees, but left Mooney the same interest in, and control over, his property as though he had never executed it, inasmuch as it had never been executed or assented to by the creditors nor even communicated to them.

There is a great distinction, however, between those cases and the present, in which there was an ultimate trust for the benefit of the wife and children which was binding upon the debtor and rendered the deed irrevocable by him.

It was further contended on behalf of the appellant that, even if the trust deed was not revocable by Mooney himself, it was void as against his creditors.

There is no principle, nor is there, so far as their Lordships know, any decision, which supports the position that a deed which contemplates the full payment of all creditors as its primary object can be held void as intended to defeat or delay creditors.

It was found by both the lower Courts that the deed was not fraudulent in fact, and their Lordships are not prepared to hold

(1) 3 Sim. 14. (2) 2 Russ. & My. 451.

that that finding was erroneous, or that the trust for the wife and children was merely colourable and collusive.

Indeed, after the concurrent findings of the lower Courts, the objection that the deed was fraudulent in fact was not insisted upon at the bar.

Still it was contended, that, the deed being voluntary so far as it related to the trust in favour of the wife and children, it was fraudulent in law and void as against creditors, under the 13 Eliz. c. 5.

It is unnecessary to refer to the numerous cases to which their Lordships' attention was called by the learned counsel in his argument for the appellants. It may, however, be stated, as regards the statute 13 Eliz. c. 5, that the rule was correctly laid down by the late Vice-Chancellor Kindersley in the case of *Thompson* v. *Webster* (1), in which he says:—

"The principle now established is this:—The language of the Act being, that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor in making the settlement was to defeat, hinder, or delay his creditors."

The only remaining question is whether the deed was void under the 27 Eliz. c. 4, as against the plaintiff as a purchaser for value. This depends upon the proper construction of that Act, coupled with the District Courts New South Wales Act, 1858, sects. 78 and 79. They are as follow:—

"Sect. 78. It shall be lawful for the registrar of every such Court, by himself or his deputies, &c., to receive and take under any writ of execution whereby he is directed to levy any sum of money, and to cause to be sold all and singular the lands, tenements, and hereditaments of or to which the person named in the said writ is or may be seised or entitled, or which he can either at law or in equity assign or dispose of.

"Sect. 79. In case of any sale by the said registrar, by himself or his deputy, of the right, title, and interest of any person of, to, or in any lands or hereditaments, the said registrar is

(1) 4 Drew. 632.

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hereby required to execute a proper deed of bargain and sale thereof to the purchaser, which deed of bargain and sale shall operate and be effectual as a conveyance of the estate, right, title, and interest of such person; provided, nevertheless, that no such deed of bargain and sale shall so operate and be effectual as aforesaid until the same shall have been duly registered in the proper office for the registration of deeds, and be in the index book thereof in the name of the person whose interest in such land and hereditaments is intended to be thereby conveyed."

Assuming that, as regards the trust for the wife and children, the conveyance was voluntary in the sense of its having been made without any valuable consideration, it is clear that Mooney after he had executed the deed, which he could not revoke, was not seised or entitled to the lands comprised in the deed within the meaning of sect. 78; nor had he any right, title, or interest therein which the registrar could convey within the meaning of sect. 79.

It was contended that if Mooney had sold the land to a purchaser for value the deed of the 30th of September, 1864, being voluntary, the trust for the wife and children would have been void as against such purchaser by reason of the 27 Eliz. c. 4. There being no fraud in fact, the trust deed when executed though voluntary was not of itself fraudulent in law. A subsequent sale to a purchaser for valuable consideration by the settlor would have raised a legal presumption of fraud in regard to the prior voluntary trust deed, which could not have been rebutted: *Clarke* v. *Wright* (1). The same presumption, however, would not arise from a subsequent sale to a purchaser for value by any other person than the settlor. The principle is clearly explained in *Doe* d. *Newman* v. *Rusham* (2). It is there laid down that

"The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shews his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such

(1) 6 H. & N. 875. (2) 17 Q. B. 724.

deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them: *Doe* d. *Offley* v. *Manning* (1). Where the same person executes the voluntary conveyance and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance it is otherwise, for the acts of one man cannot shew the mind and intention of another."

Where there is no fraud in fact, two acts by the same person are necessary to render a voluntary conveyance fraudulent under the 27 Eliz. c. 4, viz. a voluntary conveyance by the grantor, and a subsequent sale by him to a purchaser for valuable consideration.

It was laid down in the House of Lords in *Dolphin* v. *Aylward* (2) that a creditor cannot seize under an execution any interest in an estate which is vested in another person by a voluntary conveyance executed by his judgment debtor, merely upon the ground that the settlement was voluntary.

In this case Mooney reserved no interest to himself by the trust deed, he consequently had no interest which could be seized under the execution against him, and if there was nothing that could be seized there was nothing which the registrar could convey. Mooney might possibly have had the power by committing a dishonest act and selling to a purchaser for value to raise a legal unrebuttable presumption that the voluntary conveyance in favour of his wife and children was fraudulent as against the purchaser, but no one else had the power of raising such a presumption, nor was it an estate, right, title, or interest within the meaning of sect. 78 of the District Courts Act, or one which the registrar could sell or convey under sect. 79 of the Act.

For the above reasons their Lordships are of opinion that the plaintiff's claim was properly dismissed by the Primary Judge in Equity, and they will humbly advise Her Majesty to dismiss the appeal and to affirm the decree of the Supreme Court. The appellant must pay the costs of this appeal.

Solicitors for appellant: *Burton, Yeates, Hart, & Burton.*
Solicitors for respondents: *P. T. Gordon & Son.*

(1) 9 East, 59.
(2) Law Rep. 4 H. L. 500.

[HOUSE OF LORDS.]

H. L. (E.) 1888 July 16.

FREDERICK DUNBAR THOMAS . . . APPELLANT;

AND

WILLIAM JOHN KELLY AND ERNEST BAKER . . . . . } RESPONDENTS.

Bill of Sale—Schedule—Inventory of Personal Chattels—"Specifically described"—After-acquired Property—Form of Bill of Sale—Bills of Sale Act (1878) *Amendment Act* 1882 (45 & 46 *Vict. c.* 43) *ss.* 4, 5, 6, 9—*County Court Appeal—Appeal from Divisional Court to Court of Appeal—Jurisdiction of Court of Appeal*—13 & 14 *Vict. c.* 61 *s.* 14—19 & 20 *Vict. c.* 108 *s.* 68—*Judicature Act* 1873 (36 & 37 *Vict. c.* 66) *s.* 45—*Appellate Jurisdiction Act* 1876 (39 & 40 *Vict. c.* 59) *s.* 20.

A bill of sale assigned by way of security for the payment of money chattels specifically described in the schedule to the bill of sale, "together with all other chattels and things the property of the mortgagor now in and about the premises [described], and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for or renewal of or in addition to the chattels and things hereby assigned by way of security for the payment of the" money.

The grantor's goods assigned by the bill having been seized under an execution, the grantee under the bill claimed the goods specifically described in the schedule and abandoned all claim to the rest:—

Held, affirming the decision of the Court of Appeal (20 Q. B. D. 569), that the bill was not "in accordance with the form in the schedule to this Act annexed" as required by sect. 9 of the Bills of Sale Act (1878) Amendment Act 1882, and was therefore altogether void notwithstanding sects. 4, 5, and 6.

Interpleader proceedings were transferred under the Judicature Act 1884 s. 17 from the Queen's Bench Division to a county court. On appeal from the judgment of the county court the Queen's Bench Division affirmed that judgment but gave leave to appeal to the Court of Appeal:—

Held, that the Court of Appeal had jurisdiction under the Judicature Act 1873 s. 45 to hear the appeal, that jurisdiction not having been taken away by the Appellate Jurisdiction Act 1876 s. 20.

The decision upon this point in *Crush* v. *Turner* (3 Ex. D. 303) approved.

APPEAL from a decision of the Court of Appeal reported as *Kelly* v. *Kellond* (1).

(1) 20 Q. B. D. 569.

The present respondents having recovered judgment in the Queen's Bench Division against Kellond, the sheriff seized under a fi. fa. certain goods to which a claim was made by Thomas, the present appellant. The claimant was the grantee under a bill of sale by which Kellond assigned "all and singular the several chattels and things specifically described in the schedule hereto annexed or hereinafter written, together with all other chattels and things the property of the mortgagor now in and about the premises known as 119, Shirland Road, Paddington, in the county of Middlesex: And also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to the chattels and things hereby assigned by way of security for the payment of the said sum of £40 and interest thereon at the rate of 60 per cent. per annum."

The sheriff having issued an interpleader summons an order was made transferring the interpleader proceedings from the Queen's Bench Division to the Marylebone County Court, pursuant to the Judicature Act 1884 s. 17. The claimant abandoned all claim to goods other than those specifically described in the schedule to the bill of sale, and he was barred accordingly as to such other goods.

At the trial of the interpleader the county court judge gave judgment for the execution creditor on the ground that the bill of sale was void under sect. 9 of the Bills of Sale Act (1878) Amendment Act 1882.

On appeal from the county court the Queen's Bench Division (Lord Coleridge C.J. and Denman J.) dismissed the appeal, but gave leave to appeal. The decision of the Queen's Bench Division was affirmed by the Court of Appeal (Lord Esher M.R., Fry and Lopes L.JJ.) (1).

From that judgment the claimant now appealed.

July 12, 13. Before the appeal was heard on the merits a preliminary objection was taken by the respondents' counsel, viz.

(1) 20 Q. B. D. 569.

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that the Court of Appeal had no jurisdiction to entertain the appeal from the Queen's Bench Division. It was not disputed that if the Court of Appeal had jurisdiction an appeal from their decision lay to this House under the Appellate Jurisdiction Act 1876 s. 3; but it was argued that no appeal lay, whether with or without leave, from the Queen's Bench Division to the Court of Appeal, the right of appealing with special leave given by the Judicature Act 1873 s. 45 having been taken away by the Appellate Jurisdiction Act 1876 s. 20.

The appellant's counsel referred to the County Courts Act 1867 (30 & 31 Vict. c. 142) s. 8, and to 19 & 20 Vict. c. 108 s. 68, which gave a right of appeal from a county court in interpleader proceedings subject to the conditions provided by 13 & 14 Vict. c. 61 s. 14. They also cited *Crush* v. *Turner* (1) where the point in question (arising under 13 & 14 Vict. c. 61 s. 14) was decided by the Court of Appeal in favour of the right of appeal. In that case an appeal was entertained by, though the question of jurisdiction was not argued in, this House (2). They also referred to *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (3) and *Great Western Railway Company* v. *Bunch* (4) as examples of similar appeals to this House in county court cases, entertained by the House, no objection having been taken to the jurisdiction.

[LORD HALSBURY, L.C.:—We think *Crush* v. *Turner* (1) was rightly decided. The appeal must therefore be heard on its merits.]

Sir *Horace Davey* Q.C. and *Jelf* Q.C. (*W. H. Clay* and *C. C. Scott* with them) for the appellant:—

The Bills of Sale Acts 1878 and 1882 are so drawn as to make it extremely difficult to say what is the proper construction in many cases, e.g. in the present. The construction which the Court of Appeal has put upon s. 9 of the Act of 1882 gives no effect, or not due effect, to sects. 4, 5 and 6. Sect. 9 does not require a bill of sale to be "in the form" given by the Act, but only "in accordance with the form." A certain elas-

(1) 3 Ex. D. 303.
(2) 4 App. Cas. 221.
(3) 8 App. Cas. 703.
(4) 13 App. Cas. 31.

ticity and power of variation is and must be contemplated. It cannot mean that the form is to be followed verbatim et literatim. It only means that the form is to be taken as a model. If sect. 9 be read in this way the present bill of sale is valid. But even if the primâ facie meaning of sect. 9 is to invalidate a bill which assigns after-acquired property not specifically described in the schedule, that section must be read with the rest of the Act, and so reading it with sects. 4, 5 and 6, such a bill as the present is not invalidated, at all events as regards the goods specifically described. By sect. 4 a bill of sale is to have effect only in respect of the personal chattels specifically described in the schedule; and does not avoid as against the grantor a bill in respect of personal chattels not specifically described in the schedule. Sect. 5 does not avoid as against the grantor a bill of sale in respect of any personal chattels specifically described in the schedule of which the grantor was not the true owner at the time of the execution of the bill. Sect. 6 distinctly contemplates the assignment of after-acquired property whether existing or not at the time of the assignment. These sections therefore contemplate such an assignment of after-acquired property as was contained in the bill in question. Where is such an assignment to be contained? It must be put somewhere. Is it to be put in the body of the deed or in the schedule? The body of the deed seems the proper and natural place. The statutory form contains no words referring to such an assignment: it must therefore be adapted to meet the requirements of cases distinctly contemplated by the statute itself. This gets over the difficulty grounded upon the absence of a specific description in the schedule. Sects. 4 and 5 clearly contemplate a bill valid as to articles specifically described and void as to others. This is sufficient for the present case. *Roberts* v. *Roberts* (1) is an authority for this proposition, and is not affected on this point by *Ex parte Stanford* (2), where the rule as to a bill being in accordance with the form is laid down too rigidly.

Lumley Smith Q.C. and *P. Rose-Innes*, for the respondents, contended that the decision of the Court of Appeal was right,

(1) 13 Q. B. D. 794. (2) 17 Q. B. D. 259.

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and for the reasons there given (1). They referred to *Davis* v. *Burton* (2); *Melville* v. *Stringer* (3); *Ex parte Parsons* (4); *In re Williams* (5); *Ex parte Official Receiver* (6); *In re Cleaver* (7); *Furber* v. *Cobb* (8), and *Levy* v. *Polack* (9) as to bills of sale under the Act of 1882; and to *Collyer* v. *Isaacs* (10) and *Joseph* v. *Lyons* (11) as to assignments of after-acquired property.

Jelf Q.C. in reply:—

Sect. 9 is qualified by sects. 4, 5 and 6. "Where there are two inconsistent enactments it must be seen if one cannot be read as a qualification of the other:" per James L.J. in *Ebbs* v. *Boulnois* (12). "Where there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply:" per Romilly M.R. in *Pretty* v. *Solly* (13).

The House took time for consideration.

July 16. LORD HALSBURY L.C.:—

My Lords, I cannot say that any construction of this obscure statute seems completely satisfactory or gives an adequate solution to all the difficulties suggested in the argument. I certainly do not myself mean to express any opinion upon the numerous cases which have been brought under review, except so far as may be necessary to determine this case.

My Lords, I do not think it can be seriously doubted that the statute did intend to make void absolutely, and not merely against all but the grantor, every bill of sale given by way of security for money unless made in accordance with the form in the schedule to the Act. Some faint effort was made in the

(1) 20 Q. B. D. 569.
(2) 11 Q. B. D. 537.
(3) 13 Q. B. D. 392.
(4) 16 Q. B. D. 532.
(5) 25 Ch. D. 656.
(6) 18 Q. B. D. 222.
(7) 18 Q. B. D. 489.
(8) 18 Q. B. D. 494.
(9) 52 L. T. (N.S.) 551.
(10) 19 Ch. D. 342, 351.
(11) 15 Q. B. D. 280.
(12) Law Rep. 10 Ch. 484.
(13) 26 Beav. 610.

argument to suggest that the word "void" in sect. 9 must be read as a repetition of the same word in sects. 4 and 5, and that, therefore, we must by construction add the words "except as against the grantor." That such a construction would involve the necessity of adding words, and that it would involve the necessity of supposing that the legislature meant to express the same thing in the same statute by two wholly different sets of phrases would be enough to condemn it as untenable. But whatever else is obscure in the statute this is plain, that it did intend to place a restriction upon the *form* of a bill of sale; that it did intend to make some departure from form fatal to the bill of sale which should contain it.

Further, I think that the 9th section must be construed to enact not only what a bill of sale must contain, but also what it must not contain; so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the statute is not appropriate. It is, however, true that the form given is so far elastic that the statute does not make every word imperative, but provides that no form shall be permitted except one made "in accordance with the form in the schedule." The degree of latitude involved in these words it would be difficult, perhaps impossible, to define. It is in my view only necessary to apply them to the concrete case, and, applying the test of the statute as a test, to see whether the bill of sale challenged is within or without the line prescribed by the statute.

No one, of course, can be insensible to the difficulties so acutely pressed upon your Lordships by both the learned counsel who argued the case for the appellant; and undoubtedly the only answer that I can find is that suggested by Fry L.J.; and that answer has this to recommend it, that if adopted it does give a meaning to each part of the statute, and that the distinction between the body of the deed and the schedule is one well warranted by a comparison of the wording of the 4th, 5th, and 9th sections, in which certainly the bill of sale is distinguished from the schedule to which the earlier sections refer.

I own I have had great difficulty in dealing with the 2nd subsection of sect. 6. It undoubtedly seems to indicate that goods not

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capable of specific description and to be afterwards supplied may, nevertheless, be so included in the security as yet not to make the bill of sale void. But if one supposes the assignment to be of all such goods as are the subject of the proviso in question, and that in the schedule they were properly described, but added thereto were the words which give rise to the argument, namely such goods as should be in substitution thereof, the form of the deed would be in accordance with the statute, though the schedule should contemplate substituted articles.

I have come to the conclusion, not without great difficulty, that it is possible to suppose the present assignment to apply to goods properly described as presently existing goods, but which, when one looks to the schedule, one finds are nevertheless not presently assigned, but are to be substituted for them. It is to be observed that the 4th and 5th sections are only referred to in the 6th, and the statute must be supposed to have some meaning in this specific reference.

My Lords, applying the principles I have suggested, there can be no difficulty in the decision of this case. An essential condition of the deed appears to me to be a present assignment of goods capable of specific description and present assignment (see definition in the Act of 1878). It is obvious that a bill of sale which purports to assign after-acquired property, whether in the form of a covenant (its true legal effect), or, as stated specifically in words, as part of the security, is not in accordance with the "form," and therefore void. I doubt whether the reason why it is void is adequately given when it is said that such property is incapable of specific description. I think it also introduces a covenant not in accordance with the form; and the form is here, in my judgment, intended to be exhaustive of what may or may not be included in such a deed.

This bill of sale purports to assign all the chattels specifically described, and then "all *other* chattels and things the property of the mortgagor now in and about the premises known as 119 Shirland Road, Paddington, in the county of Middlesex. And also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things

or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to the chattels and things hereby assigned by way of security for the payment of the said sum of £40, and interest thereon at the rate of 60 per cent. per annum." My Lords, it would be impossible to imagine words apparently more designedly contrived to sweep up everything of which the mortgagor might at any time thereafter become possessed. It appears to me that, whatever else was permitted by the bills of sale contemplated by the statute, it never could have been intended that words so wide, whatever legal effect may be given to such words, could have been permitted so as to render it possible for a lender of money to have a claim against all future property, either on the premises upon which the assigned goods then were or on any other premises upon which those goods, or any part of them, might thereafter be—any goods, not only in substitution for or renewal of, but in addition to any goods that the mortgagor was then possessed of. I have, therefore, no difficulty whatever in saying that this bill of sale is absolutely outside the limit of interpretation which can be properly given to the language in the form prescribed by the statute, and consequently in holding that this bill of sale is void. I accordingly move your Lordships that the order appealed from be affirmed, and that this appeal be dismissed with costs.

LORD FITZGERALD :—

My Lords, the bill of sale, on the validity of which your Lordships are called on now to decide, has written thereon a schedule containing an inventory of some, but not all, "of the personal chattels comprised in it," and though objections have been raised to that schedule on the allegation that in some particulars it is insufficient, yet we assume, for the purposes of the present case, that, so far as it extends, the personal chattels "are specifically described in the said schedule." The instrument, however, professes to assign other goods not described in the schedule, viz., No. 1, in the passage which the Lord Chancellor has just read, "all other chattels and things the property of the mortgagor now in and about the premises known as 119 Shirland Road;" and No. 2, which may be called an attempt to assign after-

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acquired property—"and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or *in addition to*, the chattels and things hereby assigned by way of security for the payment of the said sum of £40 and interest thereon at the rate of 60 per cent. per annum." The schedule does not include any description of the personal goods comprised in No. 1, and does not, and it obviously could not, give any specific description of the subjects which might come within No. 2 as after-acquired property.

We assume, for the purposes of the present decision, that if it had not been for the assignment in the bill of sale of Nos. 1 and 2, the instrument and the schedule to it would have been sufficient within the provisions of s. 9 of the Act of 1882, and the bill of sale in accordance with the form given in the schedule to that Act. The question is whether those additional matters, which are not to be found in the statutable form, render it invalid, as not being "made in accordance with the form in the schedule."

Thirty-four years have elapsed since the passing of the Act of 1854. It was amended by the Act of 1866, and the two were repealed by the Act of 1878, which is still the leading Act, though altered and amended in some particulars by the Act of 1882. The title and preamble of the Act of 1854, carried on as they are by the subsequent Acts, still afford some light. The whole code is designed to prevent frauds on creditors (i.e. the public), and also to protect the borrower from the exercise of oppressive powers on the part of the lender.

The Act of 1854 seems to have dealt only with bills of sale of existing goods capable of being seized and taken possession of, and which might be the subjects of "ostensible ownership." It does not seem to have contemplated that a bill of sale as such could apply to goods not in existence, and which might never exist. The definitions in that Act of "bills of sale" and "personal chattels," and the exclusions from these definitions lead to that conclusion. The definition of "bill of sale" in the Act of

1878 is very large, and intended to meet the devices by which the previous Acts had been evaded; but according to judicial decision it was interpreted to include as bills of sale instruments which, departing from the old simplicity of the common law, professed to assign after-acquired property. The amending Act of 1882 was probably intended, inter alia, to limit the evils arising from attempts to bind future-acquired property.

The bill which eventuated in the Act of 1882 received the most critical consideration from the most capable men of the day, both in 1881 in the House of Commons and in 1882 in select committees of both Houses of Parliament, aided by the answers to a circular sent to judges and registrars as to the operation of and defects, if any, in the Act of 1878. It was apparently intended to put an end to the almost interminable legal controversies which had arisen on the previous Acts. My Lords, the Act of 1882 has not had in the latter respect the effect which the legislature intended.

We have now to consider some of the provisions of that Act. It is an amending Act, and so far as is consistent with the tenor thereof, is to be construed as one with the principal Act (the Act of 1878). The expression "bill of sale" is to have the same meaning as in the Act of 1878, "except as to bills of sale or other documents mentioned in sect. 4 of the Act of 1878, *which may be given otherwise than by way of security for the payment of money*," to which the provisions of the Act of 1882 are not to apply. It leaves such instruments to the Act of 1878; the Act of 1882 is not to apply to them.

We thus see that the provisions of the Act of 1882, which your Lordships have now to interpret, are limited to the ordinary and simple transactions of every-day life specified in sect. 9. A sale of goods, or grant or mortgage of goods, could at common law be effected without writing; but it should be accompanied by possession, and an assignment of non-existent property, that is, of property which might or might not be acquired in the future, was at common law inoperative; but if for value, it was in equity regarded as a contract of which specific performance might be enforced when (if ever) the thing came into actual existence.

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The bill of sale before your Lordships is one "made by way of security for the payment of money," which sect. 9 declares "shall be void unless made in accordance with" the statutable form. The bill of sale is to be between the parties directly; that is to say, between, on the one hand, the borrower, and on the other the lender; and the "form" seems to have been intended to attain, first, certainty and simplicity; secondly, the statement of the consideration—a sum in moneys numbered and (reading the language of the form) "now paid to" the grantor, the receipt of which the grantor thereby acknowledges; thirdly, that the assignment is confined to the chattels and things specifically described in the schedule thereto annexed; fourthly, that it shall be by way of security for the same sum then advanced, with interest at a specified rate, to be repaid to the grantee with the interest then due by equal payments on fixed days; fifthly, the insertion of the terms which the parties have agreed to for the maintenance of the security or its defeasance; and, sixthly, the incorporation by reference of the provisions of sect. 7, which restrict the right of the grantee to take possession.

Does the bill of sale before your Lordships conform to the provisions of the statute? Is it in accordance with the "form"? My Lords, I do not think that the legislature intended by the words "in accordance" a literal conformity with the statutable form of the bill of sale. I adopt the view of Bowen L.J., that it is sufficient if the bill of sale is substantially in accordance with, and does not depart from, the prescribed form in any material respect.

My Lords I concur in the opinion expressed by the noble and learned Lord on the woolsack (and on this I have never had any doubt) that this bill of sale is not in conformity with the statute and varies from the "form" in material and substantial particulars. I have already alluded to them and the noble and learned Lord has stated them in detail. The result follows that it is void against all parties.

In *Ex parte Stanford* (1), Bowen L.J. in laying down a rule of construction as the judgment of five judges of the Court of Appeal, says: "But a divergence only becomes substantial or

(1) 17 Q. B. D. 259, 270.

material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned." And he adds: "We must consider whether the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form." That he states to be the rule of construction. I would hesitate, my Lords, to criticise a proposition coming from a tribunal so important, and so weightily constituted: I am not now called on to do so; nor shall I say more than that I am not now to be taken as adopting in all its terms that rule of construction, as affording an inclusive as well as an exclusive test.

As to the question whether the general words of sect. 9 are to be restrained by the language of sects. 4 and 5, I have only to say that I agree with your Lordship and with the reasoning of Fry L.J. in the present case, as reported (1), commencing with the words: "the next point to consider,"—and I can add nothing to what the learned Lord Justice has there so well said.

The bill of sale in the present case is on a printed form and contains in print the passages which have raised the objection. It seems like a sweep net adopted after the decision in *Roberts* v. *Roberts* (2) in 1884; but now the decision of the Court of Appeal in this case, affirmed by your Lordships, prohibits in effect the assignment of future acquired property in bills of sale coming within sect. 9 of the Act of 1882: and I may add that it accomplishes a most desirable result.

LORD MACNAGHTEN:—

My Lords, to say that "the Bills of Sale Act (1878) Amendment Act (1882)" is well-drawn, or that its meaning is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe, and which seems to be contradicted by the mass of litigation which the Act has produced and is producing every day. For my own part, the more I have occasion to study the Act the more convinced I am that it is beset with difficulties which can only be removed by legislation.

(1) 20 Q. B. D. 574. (2) 13 Q. B. D. 794.

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At the same time I cannot help thinking that some of the puzzles which were presented in the course of the argument disappear if the scope of the Act is steadily kept in view.

The Act of 1882 as well as the Act of 1878 is concerned only with assurances of personal chattels. The expression "personal chattels" is strictly defined in the Act of 1878. That Act says "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops." Then follows an enumeration of things which, subject to one exception in the case of trade machinery, are not included in the expression "personal chattels." The Act of 1882 adopts the definition in the earlier Act but appears to deal with it in certain particulars by way of explanation or modification. As regards growing crops it explains, with perhaps unnecessary caution, that the expression is confined to crops actually growing at the time when the bill of sale is executed—as regards fixtures separately assigned or charged (with which the Act couples plant and trade machinery) it seems to extend the definition of personal chattels to fixtures, plant, and trade machinery used in, attached to, or brought upon any land, factory, or other place in substitution for any of the like fixtures, plant, or trade machinery, specifically described in the schedule to the bill of sale. This appears to be the meaning of the Act, because sect. 4 clearly imports that a bill of sale to which the Act of 1882 applies may "have effect" in respect of the chattels mentioned in sect. 6, sub-sect. 2. That can only be if such chattels are brought into the category of personal chattels as defined by the Act.

Notwithstanding a remark made by Lord Chelmsford in *Holroyd* v. *Marshall* (1), which obviously was not required for the decision of the case, I am disposed to think that the expression "capable of complete transfer by delivery" means capable of such transfer at the time when the bill of sale is executed. That was the view of the Divisional Court, consisting of the present Master of the Rolls and Archibald J., in *Brantom* v. *Griffits* (2). The Master of the Rolls there adopted the argument that "the Act" (it was the Act of 1854) "only applies to things

(1) 10 H. L. C. 227. (2) 1 C. P. D. 349.

which at the moment when the bill is given, and the provisions of the Act are to be applied to it, might be delivered to the assignee, and are not, but are left in the enjoyment of the assignor." Archibald J. concurred. "The application of the statute," he said, "must be limited to articles of which possession could have been given to the vendee, and which are capable of removal." I am the more inclined to adopt this view of the meaning of the expression "capable of complete transfer by delivery" because the decision in *Brantom* v. *Griffits* (1), which was given in 1876, was standing unchallenged when the Act of 1878 was passed, and obviously engaged the attention of the framers of that Act.

If this view be correct, the definition of "personal chattels" seems to exclude future or after-acquired chattels.

Under the Act of 1878 an assurance of things not within the description of personal chattels, as defined by the Act, was none the better for being in a registered bill of sale. On the other hand, a bill of sale under the Act of 1878 was none the worse for including in its terms an assurance of things not coming within the definition of personal chattels.

The question on this appeal is, whether under the Act of 1882 a bill of sale is void which includes in the body of the instrument an assignment of future or after-acquired chattels, as well as an assignment in general terms of existing chattels in or about the mortgagor's premises, other than those specifically described in the schedule. In the present case, I may observe in passing, the future or after-acquired chattels expressed to be assigned comprise things not within the protection of sect. 6.

The Act gives a form of bill of sale, and declares that, "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule to this Act annexed" (sect. 9). This section seems to me to deal with form, and form only. So purely is it, I venture to think, a question of form that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to sect. 7, though I cannot see that the omission would alter the legal effect of the document in the slightest degree, or mislead anybody. It has been

(1) 1 C. P. D. 349.

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held, and I think rightly, that sect. 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are "in accordance with the form," not "in the form." But then comes the question, When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form. Now it seems to me that if there is any one thing which is plainly a characteristic of the statutory form it is this: that in the body of the instrument there is no substantive description of the things intended to be assigned. Following the directions contained in sect. 4, the statutory form relegates to a schedule the description of the personal chattels intended to be comprised in the bill of sale.

It would not be difficult to suggest reasons more or less satisfactory why the legislature should require an inventory of the personal chattels comprised in a bill of sale, and require that inventory to be contained in a schedule. It is convenient to have the things which are the subject of assignment specified in a list, so that one may see at a glance what is and what is not included. Besides it has become very much the practice to use printed forms of bills of sale. An illiterate person might naturally take it for granted that everything that was in print was right; and then he might afterwards find himself bound to terms which were never really brought to his notice, especially since the Act of 1882 has repealed the provision requiring the attestation of a solicitor and a certificate by the solicitor that he had explained the effect of the bill of sale to the grantor. However that may be—whatever reasons may have influenced the legislature—it seems to me clear that the Act of 1882 does require that the schedule to a bill of sale shall contain, and that the body of the bill of sale shall not contain, the description of the personal chattels intended to be comprised therein.

There was a very formidable argument urged on behalf of the appellant against this view, which it is impossible to pass over in silence. It was to this effect: Sect. 4 does not avoid a bill of

sale as against the grantor in respect of personal chattels not specifically described in the schedule. Sect. 5 does not avoid a bill of sale as against the grantor in respect of personal chattels specifically described in the schedule of which the grantor was not the true owner at the time of the execution of the bill of sale. Such assignments are therefore permissible as against the grantor in a bill of sale. Room, then, must be found for them somewhere, either in the schedule or in the body of the instrument. You cannot put them in the schedule if you follow the statutory form. Besides, the body of the deed is the natural and proper place, it was said. If the statutory form does not make provision for including that which may be lawfully included you must adapt the form to meet the particular case. That, it was urged, was common sense. This, I think, was the substance of the argument.

For the present purpose it is only necessary to determine that the description of all the chattels intended to be comprised in a bill of sale to which the Act of 1882 applies must be found in the schedule. I desire not to be understood as expressing an opinion on any question not immediately and directly before the House. But I am inclined to think that the difficulty suggested is more apparent than real, and that the range of the exceptions in sects. 4 and 5 is extremely limited. The Act, as I have said, deals only with personal chattels as defined by the Acts of 1878 and 1882. That definition, if I am right, excludes from the category of "personal chattels" future or after-acquired chattels, except in the one case mentioned in sub-sect. 2 of sect. 6; chattels falling within that case seem to be referred to in sect. 5 as "specifically described" though the description of such chattels cannot be made more specific than it is in sect. 6, except that the articles for which they may be substituted would of course be specified. The Act therefore seems to recognise the description in sect. 6 as a specific description. It seems to follow that chattels which come under the description contained in sect. 6 would find their proper place in the schedule. Any other personal chattels referred to in sect. 5 of which the grantor may not be the true owner must be chattels actually in existence, in reference to which it may be observed the expression "true owner" is more appropriate

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than in reference to things of which there can be no owner true or apparent. They would be capable of being specifically described. They, too, would find their place in the schedule. The exception in sect. 4 only extends to personal chattels which admit of specific description, but by some mistake or inadvertence are not so described. The schedule seems to be the proper place for them. Whether a bill of sale overladen in its schedule with a description of things for which the statutory form has no room, and for which the Act makes no provision, would or would not be held to be in accordance with the statutory form is a matter on which I express no opinion.

The explanation I have offered may possibly be a solution of the difficulty on which the argument of the learned counsel for the appellant was mainly founded. There may be other explanations. But even if the difficulty should seem insoluble, that circumstance would not in my opinion authorize a departure from the comparatively clear provisions of the Act in regard to the form of the bill of sale.

For the reasons I have given I concur in thinking that the appeal ought to be dismissed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 16*th July* 1888.

Solicitors for appellant: *Paul Vanderpump & Eve.*
Solicitors for respondents: *Montagu Scott & Baker.*

[HOUSE OF LORDS.]

EDWARD TAILBY . . . . . APPELLANT;

AND

THE OFFICIAL RECEIVER (TRUSTEE OF THE PROPERTY OF H. G. IZON, A BANKRUPT) } RESPONDENT.

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Bill of Sale—After-acquired Property, Assignment of—Chose in Action—Assignee, Title of—Future Book Debts—Specific Performance.

A bill of sale assigned (inter alia) all the book debts due and owing or which might during the continuance of the security become due and owing to the mortgagor :—

Held (Lord FitzGerald neither assenting nor dissenting), that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business.

The decision of the Court of Appeal (18 Q. B. D. 25) reversed, and the decision of Hawkins and Mathew JJ. (17 Q. B. D. 88) restored.

Belding v. *Read* (3 H. & C. 955) and *In re D'Epineuil* (20 Ch. D. 758) overruled. *In re Clarke, Coombe* v. *Carter* (36 Ch. D. 348) approved.

APPEAL from a decision of the Court of Appeal (1).

By a bill of sale made the 13th of May 1879 H. G. Izon, described as a packing case manufacturer of 87 Parade, Birmingham, assigned to Tyrell for valuable consideration (inter alia) "all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements and effects now being or which during continuance of this security may be in upon or about the premises of the said mortgagor situate at 87 Parade aforesaid or any other place or places at which during the continuance of this security he may carry on business . . . . And also all the book debts due and owing or which may during the continuance of this security become due and owing to the said mortgagor, which fixtures, stock-in-trade, machinery, furniture, chattels, goods, effects and debts are for the most part and as near as may be mentioned in the respective schedules hereunder written."

(1) 18 Q. B. D. 25.

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In November 1884, Tyrrell having died, his executors assigned to Tailby, the present appellant, certain book debts (specified in a schedule) owing to Izon, and among them a debt of about £11 which had become due to him from Wilson Brothers & Co. since the bill of sale, and due notice of this assignment was thereupon given to Wilson Brothers & Co.

In December Izon became bankrupt. In January 1885 and after the adjudication in bankruptcy Wilson Brothers & Co. paid to Tailby the debt above-mentioned. The official receiver in Izon's bankruptcy afterwards sued Tailby in the County Court of Warwickshire for the amount of the debt as money had and received.

The county court judge gave judgment for the plaintiff on the ground that the assignment of future book debts generally, without any delimitation as to time, place, or amount, was too vague to be supported.

The Queen's Bench Division (Hawkins and Mathew JJ.) reversed this decision and entered judgment for the defendant (1). That judgment was reversed by the Court of Appeal (Lord Esher M.R. Lindley and Lopes L.JJ.) who restored the judgment for the plaintiff (2).

Against this judgment Tailby appealed.

April 17, 19, 20. *Finlay* Q.C. and *J. V. Austin* for the appellant:—

There is no such general doctrine with regard to vagueness as was held in the Court of Appeal. Reading the description as including all future debts in any business carried on anywhere, this assignment is valid. Where the consideration has passed a Court of Equity will restrain the grantor from making away with or dealing with the property in a way inconsistent with the charge, provided the description is so clear and definite that the Court can identify the property when it comes into existence. There is no rule of law or equity which prevents the covenant from attaching when the property comes into existence. The Court of Appeal said specific performance could not be granted; but this is erroneous; see per Lord Cranworth in *Hoare* v. *Dresser* (3) as to where equity

(1) 17 Q. B. D. 88. (2) 18 Q. B. D. 25. (3) 7 H. L. C. 290, 317.

will interfere. At common law no doubt a man could not grant what he had not: Perkins' Profitable Book (translated, 1642) where the doctrine is stated in all its crudity. But the principles on which equity will enforce the assignment as a contract, are clearly laid down in the judgment of the Court of Appeal in *In re Clarke, Coombe* v. *Carter* (1), where Cotton, Bowen and Fry L.JJ. having before them the decision of the Court of Appeal in the present case declined to follow it. Indeed the two cases are irreconcilable. The decision in *Holroyd* v. *Marshall* (2) is strongly in favour of the appellant, but some of Lord Westbury's dicta (which were not necessary for the decision) have been misunderstood and led to error, e.g. in *Belding* v. *Read* (3), and *In re D'Epineuil* (4), which ought to be overruled. In *Greenbirt* v. *Smee* (5) Bramwell B. is reported to have said during the argument, "If *Holroyd* v. *Marshall* (2) is to be taken to be an authority, I am afraid that *Belding* v. *Read* (3) is not one." Lord Westbury has been supposed to have laid it down that there could not be an assignable title to goods which were undetermined. His observations must be read secundum subjectam materiem, and clearly do not apply to property to come into existence at a future time. Two things have been confused: vagueness of description, and too great wideness. If the description is so vague that the property cannot be identified the contract of course cannot be enforced, as in *Pearce* v. *Watts* (6); see also *Chattock* v. *Muller* (7). Also if it is so wide as to be against public policy, e.g. where a debtor assigns all his property, the Courts have held the contract void. But neither of these objections applies here. Property to be acquired in future is assigned every day in marriage settlements, and without objection. The cases on this subject are referred to in *Coombe* v. *Carter* (8). There are other authorities which support the appellant's contention: *Bennett* v. *Cooper* (9), per Lord Langdale; *Harrington* v. *Kloprogge* (10), where an assignment of the profits of all offices or pensions of which the defendant might become

(1) 36 Ch. D. 348, 352.
(2) 10 H. L. C. 191, 209, 210, 211.
(3) 3 H. & C. 955
(4) 20 Ch. D. 758.
(5) 35 L. T. (N.S.) 168, 170.
(6) Law Rep. 20 Eq. 493.
(7) 8 Ch. D. 177.
(8) 36 Ch. D. 348.
(9) 9 Beav. 252, 258.
(10) 2 Brod. & B. 678, n.

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possessed was held valid by Lord Mansfield: *Leatham* v. *Amor* (1) and *Lazarus* v. *Andrade* (2), both following *Holroyd* v. *Marshall* (3); *Ex parte Games* (4); *Collyer* v. *Isaacs* (5), per Jessel M.R.; and *Clements* v. *Matthews* (6), where an assignment of future crops was held valid. In *Bloomer* v. *Union Coal and Iron Company* (7) an assignment of future book debts was held valid by Bacon V.C.

[LORD MACNAGHTEN referred to *Mornington* v. *Keane* (8); and *Fothergill* v. *Rowland* (9), per Jessel M.R.]

Sir *Richard Webster* A.G. and *M. Muir Mackenzie* for the respondent:—

Under the bankruptcy things in action pass to the trustee in bankruptcy: Bankruptcy Act 1883 (46 & 47 Vict. c. 52) s. 50 sub-s. 5. The respondent is therefore primâ facie entitled to this book debt. Of future book debts there can be no assignment, nothing more than a covenant to assign. If the bankruptcy had happened before the debt came into existence it would not be denied that the trustee was entitled: *Collyer* v. *Isaacs* (5) per Jessel M.R.: "A man cannot in equity, any more than at law, assign what has no existence." How far has equity gone in enforcing such a covenant to assign? The argument on the other side amounts practically to saying that there is no limit to the power to assign future acquired property, but the authorities, beginning with *Holroyd* v. *Marshall* (3) clearly establish that there is some limit to the effect equity will give to such assignments. The description of the subject-matter in *Holroyd* v. *Marshall* (3) was sufficiently precise—machinery that might be placed in a certain mill. The present case is very different: it includes all book debts in any business carried on anywhere, and even debts which were not entered in books, but which might or ought to have been. No decision has gone so far as this. *Clements* v. *Matthews* (10) is not against the respon-

(1) 47 L. J. (Q.B.) 581.
(2) 5 C. P. D. 318.
(3) 10 H. L. C. 191.
(4) 12 Ch. D. 314.
(5) 19 Ch. D. 342, 351.
(6) 11 Q. B. D. 808.
(7) Law Rep. 16 Eq. 383.
(8) 2 D. & J. 292.
(9) Law Rep. 17 Eq. 132, 139.
(10) 11 Q. B. D. 808, 814.

dent; the subject-matter was real estate: growing crops being part of the inheritance and in a different position from that of mere chattels, as pointed out by Cotton L.J. Equity cannot decree specific performance of that which is not certain and specific and cannot become so. Tried by that test the description is too vague for the Court to give specific performance. This is the true test as laid down by Lord Westbury in *Holroyd* v. *Marshall* (1) and adopted in *Belding* v. *Read* (2) per Bramwell B., and *In re D'Epineuil* (3). In considering whether the description is specific enough a Court of Equity looks at it as at the date of the assignment and not when the property comes into existence.

Finlay Q.C. in reply:—

A description is too vague only if the Court cannot see what the parties intended to deal with. There is no difference in the description required of things in action then in existence and of those not then in existence. A description may be precise and yet in one sense vague: e.g. "my ten shares in the L. Railway." The Court would not prevent the grantor dealing with any particular shares out of 100 held by him. A description of "all my shares in the L. Railway" though more wide would be less vague, and equity could restrain the grantor from dealing with any of them, and that is precisely the present case. But secondly, the appellant does not need the assistance of a Court of Equity. There has been a novus actus interveniens: the appellant has got possession of the thing in action and seeks only to retain it, not to take it from some one else. This gets rid of the difficulty suggested about specific performance—if there be a difficulty.

The House took time for consideration.

July 30. LORD HERSCHELL:—

My Lords, the short point to be determined in this case is whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid, so as to

(1) 10 H. L. C. 191, 209, 210, 211. (2) 3 H. & C. 955, 965.
(3) 20 Ch. D. 758.

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give the assignee a good title to them when they came into existence.

By an indenture of the 13th of May 1879, Henry George Izon assigned to John Tyrrell "all the book debts due and owing, or which might, during the continuance of the security, become due and owing to the said mortgagor." The debt now in question was incurred subsequently to the date of this indenture. It was not disputed by the respondent that it was a book debt which during the continuance of the security became due and owing to the mortgagor. On the 14th of November 1884, the mortgagee's executors (under whom the appellant claims) gave notice to the debtors to pay the debt to them. The appellant having received the money, the respondent, who was the official receiver under the bankruptcy of Izon, sued in the Birmingham County Court to recover the money so received as part of Izon's estate. The county court judge gave judgment for the respondent and the Court of Appeal have held that he was right in so doing. They based their judgment on the ground that, as the assignment included all book debts which might thereafter become due to the assignor in any trade which he might thereafter carry on in any place, it was so vague that the Court ought to hold that nothing passed under it. The Master of the Rolls said: "That there is a doctrine that the description may be too vague is, to my mind, beyond question. Every one of the cases that has been decided has assumed that there is such a doctrine, and in each case the Court has tried to find whether the description in the particular case was or was not too vague; but each and every of them recognises the doctrine." Now, if by "vague" be meant indefinite or uncertain, which is probably the ordinary meaning of the word, I do not think it is correct to say that the assignment in question is in that sense vague. It appears to me to be perfectly definite. It was just as capable of proof that a book debt became due to H. G. Izon in some business carried on by him as that such a debt became due in the particular business mentioned in the deed. And I do not understand the learned judges in the court below to doubt that if the assignment had been limited to book debts becoming due in that business it would have been good and effectual even as

regards future debts. Nay, it is quite conceivable that it might be more difficult to identify a debt as owing in respect of a specified business than as one due in a trader's business generally. Suppose a business to expand or to have new branches added to it, there might often be a difficulty in saying whether a debt was acquired in the specified business or not.

There is no doubt that an assignment may be so indefinite and uncertain in its terms that the Courts will not give effect to it because of the impossibility of ascertaining to what it is applicable. But that is certainly not the case with such an assignment as that which we are now considering.

If by "vague" be meant wide and covering a large area, that may certainly be said of the grant which has given rise to this controversy. And the Master of the Rolls is, I think, correct in saying that the Courts have in two cases, viz., *Belding* v. *Read* (1) and *Re D'Epineuil* (2) acted upon the doctrine that an assignment of future-acquired property will be held invalid if in that sense it is too vague. The learned county court judge was bound by those decisions, but it is open to your Lordships to review them, and to consider whether they rest upon any sound basis. And, my Lords, I conceive that you have no alternative but to consider the question apart from authority, and to review the authorities, for to my mind it is impossible to reconcile the decision under appeal with that ~~of~~ the Court of Appeal in *Combe* v. *Carter* (3), without resorting to distinctions which cannot be justified on principle. In that case the mortgage security covered "all moneys of or to which the mortgagor was, or might during the security become, entitled under any settlement, will, or other document, either in his own right or as the devisee, legatee, or next of kin of his father or any other person or persons." The mortgagor became entitled under a will to a share of the residuary estate. The Court of Appeal held that this share was covered by the mortgage. The decision in the case now before your Lordships was much pressed upon them in argument. The Court, however, consisting of Cotton, Bowen, and Fry L.JJ., refused to regard it as governing the case they had to decide. I

(1) 3 H. & C. 955. (2) 20 Ch. D. 758.
(3) 36 Ch. D. 348.

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can hardly say that they distinguished it except by saying that the terms of the two instruments and the subject-matter to which they related were not identical, and that as the former case laid down no principle it was inapplicable to that before them. I confess I am unable to see any sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him and one assigning future bequests and devises to which he may under any will become entitled. The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence and it is sought to enforce the security. I think the case of *Coombe* v. *Carter* (1) was correctly decided and that the views expressed by the learned judges are equally applicable here. That case established no new principle; it proceeded on well settled lines. In the case of *Bennett* v. *Cooper* (2) where the security included all legacies which had already or might thereafter be given or bequeathed to the assignor or his wife by any person whomsoever, Lord Langdale held that legacies subsequently bequeathed to the mortgagor were bound. And few covenants are more common or have been more often given effect to than the covenant contained in marriage settlements to settle the wife's future-acquired property. It has never been doubted that these attach as soon as such property comes into existence.

The only authorities that can be cited as contrary to the view I am submitting to your Lordships, are those already referred to of *Belding* v. *Read* (3) and *Re D'Epineuil* (4). In the latter case Fry L.J. avowedly followed *Belding* v. *Read* (3). Another point was, however, there adverted to. The charge under consideration in that case included all the present and future personalty of the person giving it. The learned judge suggested that such a charge might be invalid as depriving the mortgagor of the power of maintaining himself. In *Coombe* v. *Carter* (1) the Court of Appeal left open the question whether such a disposition (which would of course be without effect at law so far as regarded future-

(1) 36 Ch. D. 348.
(2) 9 Beav. 252.
(3) 3 H. & C. 955.
(4) 20 Ch. D. 758.

acquired property) would be enforced in equity. I think your Lordships may also be content to put aside this point, which certainly does not arise in the case before you.

I cannot think that the decision in *Belding* v. *Read* (1) was correct so far as it turned on the same point as has now to be decided. The assignment to the extent to which it related to after-acquired chattels was undoubtedly void at law, and the question was whether it was effectual in equity to pass the property in question. It appears to me that the view taken by the learned judges proceeded on a misapprehension of some observations of Lord Westbury in *Holroyd* v. *Marshall* (2). That learned Lord used the following language: "If a vendor or mortgagor agrees to sell or mortgage property real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee according to the terms of the contract." Now whatever the learned Lord meant by limiting the doctrine to the class of cases in which a Court of Equity would decree specific performance, he certainly did not intend to exclude cases in which after-acquired property fell within general descriptive words contained in the deed, for he enforced the security in that very case against such property. Nor, again, can I find any trace of the view that a Court of Equity would not enforce a contract relating to future-acquired property if it was vague, in the sense of embracing much within its terms, for, as I have pointed out, Courts of Equity have frequently enforced such contracts. I think the language used referred only to that class of cases to which he had alluded in an earlier part of his opinion, where it could not be predicated of any

(1) 3 H. & C. 955. (2) 10 H. L. C. 191.

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specific goods that they fell within the general descriptive words of the grant.

In my opinion the judgment appealed from should be reversed, and the judgment of the Queen's Bench Division restored, and the respondent should pay the costs in the Court below and the costs of this appeal, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, the circumstances which have given rise to this litigation may be very shortly stated.

Henry George Izon, who at that time carried on the business of a packing-case manufacturer in Birmingham, by mortgage dated the 13th of May 1879 assigned, for valuable consideration received, to the late John Tyrell, his stock-in-trade, and "all the book debts due and owing or which may during the continuance of this security become due and owing to the said mortgagor." In the months of October and November 1884 Izon supplied a firm of Wilson Brothers & Co., upon credit, with goods to the value of £10 7*s.* 11*d.* The appellant, who had acquired Tyrell's interest in the debt, gave notice of the assignment to that firm, and required them to make payment of it to himself, which they accordingly did. Some time after the date of the notice Izon was adjudged bankrupt, and the respondent, who is trustee of his estate, now sues the appellant for repayment of the amount received by him from Wilson Brothers & Co.

It does not clearly appear whether the debt in question was incurred to the mortgagor in the business in which he was engaged in May 1879, or in some other trade. In the argument addressed to your Lordships it was rightly assumed that the assignment comprehends every future book debt becoming due to Izon, in any profession or trade which may be followed by him in any place and at any time during the continuance of the security constituted by the mortgage. The respondent admitted that the liability of Wilson Brothers & Co., whenever it emerged, was, and until satisfied by payment continued to be, a proper book debt, due and owing to the mortgagor. He maintained his right to it, in competition with the appellant, upon the single ground that the assignment of future book debts, in the mort-

gage of 1879, is ineffectual to carry any equitable interest to the assignee.

The judge of the County Court of Warwickshire, before whom the suit was brought, gave judgment for the respondent. He held, in deference to the authority of *Belding* v. *Read* (1) and *In re Count D'Epineuil* (2), that an assignment of future book debts generally without any delimitation of time, place, or amount, is too vague to be supported. His decision was reversed by Hawkins J. and Mathew J., who were of opinion that the case fell within the principle to which this House gave effect in *Holroyd* v. *Marshall* (3); but it was restored by the Court of Appeal, consisting of the Master of the Rolls and Lindley and Lopes L.JJ.

Had there not been such a conflict of judicial opinion, I should have thought that the question thus raised for decision admitted of one answer only. The rule of equity which applies to the assignment of future choses in action is, as I understand it, a very simple one. Choses in action do not come within the scope of the Bills of Sale Acts, and though not yet existing, may nevertheless be the subject of present assignment. As soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee. Mere difficulty in ascertaining all the things which are included in a general assignment, whether in esse or in posse, will not affect the assignee's right to those things which are capable of ascertainment or are identified. Lord Eldon said in *Lewis* v. *Madocks* (4): "If the Courts find a solid subject of personal

(1) 3 H. & C. 955.
(2) 20 Ch. D. 758.
(3) 10 H. L. C. 191.
(4) 8 Ves. 156.

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property they would attach it rather than render the contract nugatory."

In the case of book debts, as in the case of choses in action generally, intimation of the assignee's right must be made to the debtor or obligee in order to make it complete. That is the only possession which he can attain, so long as the debt is unpaid, and is sufficient to take it out of the order and disposition of the assignor. In this case the appellant's right, if otherwise valid, was, in any question with the respondent, duly perfected by his notice to Wilson Brothers & Co. before Izon became a bankrupt.

The learned judges of the Appeal Court were unanimously of opinion that the description of book debts in the assignment of Tyrell is "too vague," and it is upon that ground only that they have held the assignment to be invalid. The term which they have selected, in order to express what they conceived to be the radical defect of the assignment, is susceptible of at least two different meanings. It may either signify that the description is too wide and comprehensive, without implying that there will be any uncertainty as to the debts which it will include, if and when these come into existence, or it may signify that the language of the description is so obscure that it will be impossible, in the time to come, to determine with any degree of certainty to what particular debts it was intended to apply. In the latter sense the description of future book debts in the mortgage of 1879 does not incur the imputation of vagueness. No one has suggested that the expression "book debt" is indefinite; and it is, in my opinion, very clear that every debt becoming due and owing to the mortgagor, which belongs to the class of book debts (a fact quite capable of ascertainment), is at once identified with the subject-matter of the assignment.

The ground of decision in the Appeal Court was obviously this: that the description of future debts is "too vague," in the sense of being too wide and comprehensive, inasmuch as it embraces debts to become due to the mortgagee in any and every business which he may think fit to carry on. If it had been limited to debts arising in the course of the business of packing-case manufacturer, in which Izon was engaged at the date of the mortgage, the Master of the Rolls was, as then advised, prepared

to hold that the description would not have been too vague. Upon that point the other members of the Court express no definite opinion, Lindley L.J. merely remarking, "I do not say that an assignment of future book debts must necessarily be too vague." All of their Lordships were evidently under the impression that they were deciding the case according to a well-established equitable doctrine, which Lopes L.J. traces to *Belding* v. *Read* (1).

It is unnecessary for the purposes of this case to consider how far a general assignment of all after-acquired property can receive effect, because the assignment in question relates to one species of property only. I have been unable to discover any principle upon which the decision of the Court of Appeal can be supported, unless it is to be found in *Belding* v. *Read* (1). That case arose in a Court of Common Law, and, with all deference to the very learned judges who decided it, I am bound to say that, in my opinion, they misapprehended the doctrine laid down by Lord Westbury in *Holroyd* v. *Marshall* (2), which was not new doctrine, but, as the noble Lord explicitly stated, was the mere enunciation of elementary principles long settled in Courts of Equity. It is possible that the learned judges were misled by the reference which the noble Lord makes to specific performance, an illustration not selected with his usual felicity. Not a single decision by an Equity Court was cited to us, prior in date to *Belding* v. *Read* (1), which gives the least support to the opinions expressed in that case, and I venture to doubt whether any such decision exists. It is true that judges on the equity side of the Court have, in one or two instances, deferred to the views expressed in *Belding* v. *Read* (1), which they assumed to be an authoritative exposition of the law applied by this House in *Holroyd* v. *Marshall* (2); but these views conflict with the previous cases in equity, to which Lord Westbury referred as establishing a well-known and elementary principle. In *Bennett* v. *Cooper* (3), Lord Langdale, M.R., gave effect to an equitable mortgage by a debtor of "all sums of money then or thereafter to become due to him, and all legacies or bequests which had

(1) 3 H. & C. 955. (2) 10 H. L. C. 191.
(3) 9 Beav. 252.

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already or might thereafter be given or bequeathed to him or his wife, by any person whomsoever." I cannot understand upon what principle an assignment of all legacies which may be bequeathed by any person to the assignor is to stand good, and effect is to be denied to a general assignment of all future book debts. As Cotton L.J. said, in *In re Clarke* (1): "Vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract." A future book debt is quite as capable of being identified as a legacy; and in this case the identity of the debt, with the subjects assigned, is not matter of dispute. When the consideration has been given, and the debt has been clearly identified as one of those in respect of which it was given, a Court of Equity will enforce the covenant of the parties, and will not permit the assignor, or those in his right, to defeat the assignment upon the plea that it is too comprehensive.

I am accordingly of opinion that the order appealed from ought to be reversed, and the judgment of the Divisional Court restored.

LORD FITZGERALD:—

My Lords, I feel great difficulty as to the reasons which I am about to give. Before your Lordships proceed to decide finally the abstract question which it is said that this appeal raises, it seems to me to be necessary to review and get before the House accurately the facts of the case.

[His Lordship having minutely considered the whole evidence in the cause, from which he deduced the conclusion that the whole liability of the mortgagor under the mortgages of 1879 and 1880 had been respectively discharged, and that the two deeds had become satisfied securities before any assignment to Tailby of the book debts, and consequently could afford no answer to the claim of the receiver, then proceeded as follows:—]

It might, however, be unfit to act here on suggestions of fact, though arising on the documentary evidence alone, which do not appear to have been made in any of the courts below and which certainly were not brought under the notice of the acute

(1) 36 Ch. D. 353.

and able judge of the Court of first instance. The case was put forward as a test case, and supposed to raise for decision the one large question on which the noble and learned Lords have just stated their conclusion.

There is, however, a view of the transactions which must be disposed of. Let us assume that the instrument of 1879 was an existing security, unsatisfied and in full force at the time of the assignment of the book debts to Tailby, and that all the steps taken by the mortgagee had been regular and effectual. The deed of 1879 had not, as to the future debts, any greater operation than as an agreement for value to assign those future debts when they came into existence. I do not now pause to consider whether equity would from time to time, as debts became due, decree specific performance of that agreement. It was at least a contract which as between the immediate parties to it had certain efficacy, and was not wholly inoperative. If, for instance, as to future-acquired chattels coming within its provisions the mortgagee had managed peaceably to gain actual possession of them he could retain that possession as against the mortgagor; and so if, claiming to be entitled under his deed, to receive a future accruing debt, he had demanded and received payment of it from the debtor, the mortgagor could not recover from the mortgagee the sum he had so received. Let us see how this case stands in this respect. The deed of 1879 contains an assignment of future debts and also that comprehensive appointment by the mortgagor of the mortgagee as his attorney, to execute for him and in his name assignments of these future rights, when and as they should arise either to himself or to any other person, and also a power to receive those debts when and as they became payable and give full and effectual discharges for them, a power in fact to do for himself and in virtue of that authority all that a Court of Equity could do for him if there had been no difficulties in the way of obtaining relief from that tribunal. There is nothing in law to prohibit the mortgagor from conferring such an authority on the mortgagee, or to prevent parties from helping themselves if they can lawfully do so.

The whole of the steps taken in November were lawful and unobjectionable, and the parties were competent to take them.

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The deed of 1879 professed to pledge these future debts to the mortgagee and conferred on him large and exceptional powers to enforce that pledge. His representatives availed themselves of their powers and position to enforce their rights, and did all that they could lawfully do as equivalent to taking possession and determining reputed ownership: see *In re Hennessy* (1). The mortgagor certainly did not oppose, and the proper inference is that he acquiesced. If Tailby had received the amount of Wilson's debt before the adjudication in January 1885, his title to retain it against the receiver would not be open to any question. Does the adjudication before actual payment and the intervention of the receiver make any difference? The latter does not appear to have intervened until the following month of May; the payment was actually made by Wilson in January previous. The assignee, trustee, and receiver in bankruptcy derive their title to the estate through the bankrupt and subject to the rights and equities which would affect it in the hands of the bankrupt, save where by statute for the protection of creditors overreaching rights are conferred upon them. There is no allegation that the adjudication here had any retrospective operation, nor is it alleged that the transactions with Tailby were tainted with any fraud, nor can I discover any satisfactory ground on which the receiver can override the proceedings of November which were binding on the bankrupt, and recover the money actually paid over in January.

It seems to me therefore, though I express the view with hesitation, that the action of the receiver in the county court fails, that he is not entitled to recover the money received by Tailby from Wilson, and that the defendant Tailby is entitled to judgment. If, my Lords, I am correct in this view, no further question arises—the decision of the Court of Appeal and of the county court judge should be reversed, and the judgment of the Divisional Court should be restored.

My Lords, in the course of the argument at the bar some of these considerations were thrown out for discussion, but it was said in reply that this was "a test case" to elicit your Lordships' decision on an abstract question of great public importance.

(1) 2 Dr. & War. 555.

The Master of the Rolls is represented to have put the question thus: "It seems to me that according to the ordinary rules of construction, the deed of 1879 applies to the book debts which may become due to Izon in any trade which he may hereafter carry on anywhere, that is, any trade which it may please him during the continuance of the security, or which it may be for his benefit to carry on in any part of England, any part of Wales, any part of Scotland, or in any part of France, Germany, Ireland, or America. That is the true reading, and is that, or is it not, within the doctrine that the description of these book debts is so vague that the Court will hold that nothing passed under it?" It is not quite certain that this is critically correct, and the question would seem rather to be whether the description of the future debts professed to be assigned by the deed of 1879 was so vague and so uncertain that the mortgagee could not so far actively enforce it in any Court of Justice. I decline to decide test questions, merely because the case is called "a test case." What is a test case? Probably it is meant to represent a case in which some question of law necessarily arises, governing some other like cases, and to which your Lordships are required to apply the crucial test of the judgment of the House.

My Lords, when such a case comes before the House, your Lordships must and do decide it, but it is not the province of the House to decide abstract questions which are not actually necessary, as the foundation of the judgment of the House. The question has not, up to the present moment, been finally decided. It is one of no inconsiderable difficulty and involves considerations of public policy. What construction is to be put on "future book debts?" Does it mean the trade debts entered in the trader's books, or does it mean the nett residue of those debts after satisfying the claims of those creditors by means of whose property those debts came into existence? Would an account have to be taken, as in the case of the trading of a bankrupt after bankruptcy, and without certificate, and debts becoming due to him in that second trading, and claimed by the assignee as after-acquired property? see *Troughton* v. *Gitley* (1). The reports of

(1) Amb. 630.

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Ambler were not unfrequently questioned, but the decree, taken from the registrar's book, is given in the note to *Tucker* v. *Hernaman* (1) and the decision in *Troughton* v. *Gitley* (2) was adopted by Turner L.J.

Suppose, too, in the case of future debts that the mortgagor had obtained bills and notes or other securities from his debtors, how are the rights and liabilities of the parties to be adjusted? Or suppose a trader to become bankrupt, his assets consisting largely of recent book debts, representing his stock in trade, out of which they were created; are those book debts to go to the holder of a bill of sale, probably some years old, not registered, and of which the real creditors had no notice?

I allude only to these possible contingencies as illustrating some of the difficulties that beset the question, and indicating the inexpediency of carrying the law a step further than it has hitherto gone in practice.

My Lords, in a case recently before the House, your Lordships considered that the policy of the Bills of Sale Act of 1882 was to prohibit, in cases coming within its provisions, bills of sale of property not in existence but which might be acquired thereafter (3). Your Lordships are now asked to give effect to an instrument which, though a bill of sale of future debts of the most unlimited and undefined character, does not as to book debts come within the Bills of Sale Code.

My Lords, I have listened to the weighty reasons given by my noble and learned friends, and I have read the judgment to be delivered by my noble and learned friend who is to follow me. That judgment is one of great learning and ability and remarkable for its boldness. I have weighed all the reasons so powerfully given, and hope your Lordships will excuse me if, for the present, I hesitate, and, for the reasons I have given, decline to express either assent to or dissent from the conclusions of my noble and learned friends.

The course which I have deemed it expedient to adopt renders it unnecessary for me to consider the authorities.

(1) 4 D. M. & G. 396. (2) Amb. 630.
(3) *Thomas* v. *Kelly*, ante, p. 506.

LORD MACNAGHTEN:—

My Lords, I venture to think that this case is free from difficulty when the facts are understood.

Izon was a packing-case manufacturer. In 1879 he compounded with his creditors. At Izon's request, Tyrrell signed promissory notes for the last instalment of the composition, taking from Izon a bill of sale as a counter-security.

The bill of sale is dated the 13th of May 1879. It assigns to Tyrrell by way of mortgage, among other property, all the stock-in-trade and effects which during the continuance of the security might be on the mortgagor's then premises, or at any other place at which during the continuance of the security he might carry on business, and also (to quote the words of the deed) "all the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor." Then there is a power of attorney in the most ample terms; a proviso that if the mortgagor on demand fails to pay the amount due, the mortgagee may take possession and sell the property in mortgage; and a proviso that until default the mortgagor may use and enjoy all the mortgaged premises; and lastly, there is a covenant for further assurance. Another bill of sale was given in 1880, but I need not refer to it; it was admitted at the bar that it had no bearing on the question before your Lordships.

I pause for a moment to point out the nature and effect of the security created by the bill of sale of 1879. It belongs to a class of securities of which perhaps the most familiar example is to be found in the debentures of trading companies. It is a floating security reaching over all the trade assets of the mortgagor for the time being, and intended to fasten upon and bind the assets in existence at the time when the mortgagee intervenes. In other words, the mortgagor makes himself trustee of his business for the purpose of the security. But the trust is to remain dormant until the mortgagee calls it into operation.

The business in the immediate contemplation of the parties was, of course, the business in existence at the date when the bill of sale was given. But the assignment is not limited to that; it extends to any business which the mortgagor may carry

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on during the continuance of the security. That was an obvious, and, if not forbidden by law, a proper precaution. A tradesman who has been unfortunate in his business is perhaps as likely to try a change as one who has been uniformly successful. The draftsman I think would have shewn more simplicity than skill if he had left it in the power of the mortgagor to imperil or defeat the security by altering his business, or by transferring his capital to some other enterprise.

In reliance on the arrangement I have described, Tyrrell paid a large sum to Izon's creditors. But he seems to have been content with his security; and Izon continued to trade without any interference on his part, and apparently without any alteration in the character of the business. In 1885 the executors of Tyrrell, who was then dead, thought fit to call in the money due to his estate. They demanded payment. They took possession of the mortgaged premises, so far as it was practicable to do so, and they sold the book debts.

Among the book debts which were sold was one which had recently become due from Messrs. Wilson Brothers & Co. The purchaser at once gave notice to them. The next thing that happened was that Izon became bankrupt. After that Messrs. Wilson Brothers & Co. paid the purchaser.

The Court of Appeal has held unanimously that the official receiver is entitled to recover the money from the purchaser. Your Lordships have now to determine whether that decision is right.

The question is not complicated by any circumstances other than those I have mentioned. The transaction between Izon and Tyrrell is not impeached as fraudulent under the Act of Elizabeth, or on any other ground. Nor is it necessary to consider the provisions of the Bills of Sale Acts. Choses in action are expressly declared not to be personal chattels within the meaning of those Acts.

The grounds on which my noble and learned friend opposite has founded his opinion were not discussed at the bar, nor is there, I think, sufficient evidence before your Lordships to enable your Lordships to act on them.

The claim of the purchaser was rested on well-known principles.

It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

The position of the purchaser was assailed on one point, and one point only. It was not disputed that Tyrrell gave valuable consideration for the bill of sale, or that Tyrrell's executors were within their rights in selling whatever was comprised in the security. It was not denied that the debt purchased was a book debt which became due and owing to Izon during the continuance of the security, nor was any question raised as to the sufficiency of the notice which the purchaser gave to Messrs. Wilson Brothers & Co. The contention of the learned counsel for the respondent was this: They asserted as a proposition of law that an assignment of future book debts not limited to any specified business is too vague to have any effect. Starting from that proposition they asked your Lordships to come to the conclusion that the assignment of book debts in the present case was void from the beginning as including in its terms book debts which could not be made the subject of valid assignment. I do not stop to consider whether that is a necessary or legitimate conclusion. It is a startling result certainly, and I shall have a word to say about it by-and-by. At present I am merely inquiring whether the original proposition is sound. In the leading judgment in the Court of Appeal it is said that the doctrine which covers the proposition is well established, because "in every one of the cases in point that were cited its existence has been assumed." The principle of the doctrine, however, is not stated; the doctrine itself is not defined; the cases which are supposed to be in point are not reviewed or even named. But the high authority of the learned judges who have adopted this view makes it necessary to examine the matter closely. The learned counsel for the respondent gave your Lordships every

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assistance that ingenuity and industry could supply; and the result of their labours may fairly be summed-up as follows: The origin of the doctrine, modern though it be, is lost in obscurity. Before *Holroyd* v. *Marshall* (1) no support for it can be found. Possibly it may be evolved from *Holroyd* v. *Marshall* (1). Lopes L.J. seems to think so. It assumed a definite form in *Belding* v. *Read* (2). It was recognised by Fry J. in *In re Count D'Epineuil* (3), and it received the stamp of authority from what was said or implied by two of the learned judges who decided *Clements* v. *Matthews* (4). No other authority or semblance of authority was produced. My Lords, I have read *Holroyd* v. *Marshall* (1) many times, and I can discover no trace of the doctrine there. *Belding* v. *Read* (2), as Bowen L.J. points out, was founded upon a misapprehension of Lord Westbury's judgment in *Holroyd* v. *Marshall* (1). In *In re Count D'Epineuil* (3) the learned judge, as he stated in *In re Clarke* (5) thought himself bound by *Belding* v. *Read* (2), and simply followed the decision in that case. As for the order made in *In re Count D'Epineuil* (3) it seems to me to have been only too favourable to the claimant. I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind. Finally, Cotton L.J. has himself disclaimed the hidden meaning attributed to his judgment in *Clements* v. *Matthews* (4).

So much for authority. What foundation is there for the doctrine apart from authority? The learned counsel for the respondent did not pretend to be wiser than the Court of Appeal. They, too, neither defined the doctrine the aid of which they invoked, nor stated any principle on which it could be supposed to rest. They contented themselves with endeavouring to maintain the proposition that an assignment by a trader of future book debts not confined to a specified business is too vague to be effectual. Why should this be so? If future book debts be assigned, the subject-matter of assignment is capable of being identified as and when the book debts come into existence,

(1) 10 H. L. C. 191.
(2) 3 H. & C. 955.
(3) 20 Ch. D. 758.
(4) 11 Q. B. D. 808.
(5) 36 Ch. D. 348.

whether the description be restricted to a particular business or not. Indeed the restriction may render the task of identification all the more difficult. An energetic tradesman naturally develops and extends his business. One business runs into another, and the line of demarcation is often indistinct and undefined. The linendraper of to-day in the course of a few years may come to be the proprietor of an establishment providing everything that man wants, or woman either, from the cradle to the grave. In such a case I can easily conceive that difficult questions might arise if the book debts assigned were limited to a particular business.

It was admitted by the learned counsel for the respondent, that a trader may assign his future book debts in a specified business. Why should the line be drawn there? Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy? The limit proposed is purely arbitrary, and I think meaningless and unreasonable. The rule laid down by the Court of Appeal would not help to identify or ascertain the subject-matter of the contract in any case. It might have the opposite effect. It would be no benefit to the assignor's general creditors. It might prevent a man from raising money on the credit of his expectations in his existing business—on that which is admitted to be capable of assignment—in consequence of the obvious risk that some alteration in the character of the business might impair or defeat the security.

Under these circumstances I think your Lordships will come to the conclusion that the proposition on which the respondent relies as the foundation of his case cannot be supported on principle, and that the authorities on which it was supposed to rest may be traced to a decision of the Court of Exchequer which itself is founded on an erroneous view of the principles recognised in this House in *Holroyd* v. *Marshall* (1).

My Lords, I should wish to say a few words about *Holroyd* v. *Marshall* (1), because I am inclined to think that *Belding* v. *Read* (2) is not the only case in which Lord Westbury's observa-

(1) 10 H. L. C. 191. (2) 3 H. & C. 955.

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tions have been misunderstood. To understand Lord Westbury's judgment aright, I think it is necessary to bear in mind the state of the law at the time, and the point to which his Lordship was addressing himself. *Holroyd* v. *Marshall* (1) laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd* v. *Marshall* (1) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust:" *Legard* v. *Hodges* (2). It had also been determined by the highest tribunals in the country, short of this House—by Lord Lyndhurst as Lord Chancellor in England, and by Sir Edward Sugden as Lord Chancellor in Ireland—that an agreement binding property for valuable consideration had precedence over the claim of a judgment creditor. Some confusion, however, had recently been introduced by a decision of a most eminent judge, who was naturally less familiar with the doctrines of equity than with the principles of common law. In that state of things, in *Holroyd* v. *Marshall* (1), in a contest between an equitable assignee and an execution creditor, Stuart V.C. decided in favour of the equitable assignee. His decision was reversed by Lord Campbell L.C. in a judgment which seemed to strike at the root of all equitable titles. Lord Campbell did not hold that the equitable assignee obtained no interest in the property the subject of the contract when it came into existence. He held that the equitable assignee did obtain an interest in equity. But at the same time he held that the interest was of such a fugitive character, so shadowy, and so precarious, that it could not stand against the legal title of the execution creditor, without the help of some new act to give it substance and strength.

(1) 10 H. L. C. 191. (2) 1 Ves. Junr. 478.

It was to this view, I think, that Lord Westbury addressed himself; and by way of shewing how real and substantial were equitable interests springing from agreements based on valuable consideration, he referred to the doctrines of specific performance, illustrating his argument by examples. One of the examples, perhaps, requires some qualification. That, however, does not affect the argument. The argument is clear and convincing; but it must not be wrested from its purpose. It is difficult to suppose that Lord Westbury intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called, where the contract is executory, are to be applied to every case of equitable assignment dealing with future property. Lord Selborne has, I think, done good service in pointing out that confusion is sometimes caused by transferring such considerations to questions which arise as to the propriety of the Court requiring something or other to be done in specie (*Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (1)). His Lordship observes that there is some fallacy and ambiguity in the way in which in cases of that kind those words "specific performance," are very frequently used. Greater confusion still, I think, would be caused by transferring considerations applicable to suits for specific performance—involving, as they do, some of the nicest distinctions and most difficult questions that come before the Court—to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants.

The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done

(1) Law Rep. 16 Eq. 433.

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if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created. There are cases where the rights of the parties may be worked out by means of specific performance, though no specific lien is effected by the agreement itself. More frequently a specific lien is effected though no case of specific performance is contemplated. Take the case of *Mornington* v. *Keane* (1). There Lord Mornington covenanted that he would, on or before a specified day, either by a charge on freehold estates in England or Wales or by an investment in the Funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife. The Lord Chancellor did not doubt that the covenant would entitle the covenantee to have it performed in specie, but still it was held by the Court that the covenant of itself created no lien on the covenantor's property. Take the present case. The rights of the parties are completely defined by the bill of sale. Though there is the usual covenant for further assurance, it is plain that no further deed was contemplated. Yet no one can doubt that if Izon had attempted to receive outstanding book debts after the mortgagee had intervened, the Court would at once have lent its assistance by the appointment of a receiver. The case of *Metcalfe* v. *Archbishop of York* (2) is, I think, a good illustration of the argument I am presenting to your Lordships. In 1811 an incumbent charged his benefice with an annuity, and covenanted that if he should be preferred to any other benefice he would charge it with the annuity, and that in the meantime it should stand charged therewith, and there was a covenant for further assurance. At the date of the deed the charge was not illegal, for the statute of Elizabeth had been repealed in 1803. In 1814 the incumbent was preferred to another living. In 1817 charges on ecclesiastical benefices were again prohibited by the Act 57 Geo. 3, c. 99. No legal charge upon the new living had been executed before that Act passed. A question afterwards arose between the person entitled to the annuity and judgment creditors in possession under a sequestration. It was argued by Mr. Jacob for the judgment creditors

(1) 2 D. & J. 292. (2) 1 My. & Cr. 547.

that as specific performance would be in contravention of the statute the equitable title must fail. It was contended that the covenant was all one, and that it amounted only to a covenant for a legal charge which was prohibited by law before any attempt was made to enforce it. But the Lord Chancellor was of opinion that that was not the true construction of the deed, and that there was an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants that all equitable charges rest upon specific performance and the right to have a legal charge. Lord Cottenham, however, replied, "This is by no means so," and he affirmed the Vice-Chancellor's judgment giving effect to the equitable charge. There the contract for a legal charge would have raised a case of specific performance. But specific performance of that contract was out of the question. The contract for an equitable charge raised no question of specific performance. A contract for value for an equitable charge is as good an equitable charge as can be. It could not be made any better, though the aid of the Court might be required to protect or to give effect to it. Mr. Jacob's argument (to cite the words of the report, p. 549) was this: "The whole doctrine of equitable charges rests on the right to specific performance, for a person having an equitable charge has no estate or interest." Lord Cottenham summarily rejected the proposition. Lord Westbury demolished the foundation on which it was put. And, oddly enough, the proposition is now supposed to be established by Lord Westbury's authority.

It may be said that this a question of words. To a great extent it is so; most questions are. But I venture to think that the discussion is not out of place, because I observe that Lindley L.J., from whom I differ on a point of equity with much reluctance, was led to disregard the rights of the purchaser in the present case in consequence of the difficulties presented to his mind by the application of the doctrines of specific performance.

In the course of the argument your Lordships were referred to a recent case, *In re Clarke, Coombe* v. *Carter* (1). In principle I am unable to distinguish that case from the present, though others

(1) 35 Ch. D. 109; 36 Ch. D. 348.

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have been more fortunate. *In re Clarke* (1) was the case of a mortgage. So is this. The contest there, as it is here, was with the mortgagor's general creditors. The assignment which gave rise to the question in that case was an assignment of any moneys to which the mortgagor might be entitled under any will. A charge on book debts in a business not yet established, and perhaps not even thought of, is at best a doubtful security. Most people would think it speculative. Some might call it visionary. But the same terms might be applied without any great impropriety to a charge on a possible legacy from an unknown friend or secret admirer. As to vagueness, whatever that expression may mean, I cannot see that the one can be more vague than the other. In *In re Clarke* (1) the charge was enforced against a legacy which happened to come to the mortgagor some years after the mortgage was made. The judgment of Kay J. was read to your Lordships. And a very able and exhaustive judgment it is. No one is more familiar with the doctrines of equity than that learned judge. But I gather from his remarks that if he had not been pressed with the decision now under appeal he would have treated the case as a matter of course not open to argument.

My Lords, I need hardly say that I think the decision in *In re Clarke* (1) unquestionably correct, and I should add nothing more about it but that I find that some of the learned judges have drawn a distinction which I confess I am unable to appreciate. It was said that both in *Clements* v. *Matthews* (2) and *In re Clarke* (1), the contract was divisible, but that in the present case the contract is indivisible. My Lords, I am not sure that I quite understand what is meant by saying that the contract is divisible in cases of this description. The contract is not, I think, divisible in the usual acceptation of the word. The consideration is not intended to be apportioned, nor can that for which the consideration is given be said to be divisible except in the sense that it consists of a collection of things capable of separation or division without destruction. To say that an assignment by a trader of all future book debts in his present business and also of all future book debts in any other business

(1) 35 Ch. D. 109; 36 Ch. D. 348. (2) 11 Q. B. D. 808.

which he may hereafter undertake, is divisible, but that an assignment of all his future book debts is not divisible, seems to me to be attributing substance and reality to the merest verbal distinction. In the present case Lopes L.J. says "here the words are not capable of being read distributively." The rest of the Court take the same view. And *In re Clarke* (1) Cotton and Fry L.JJ. both seem to think the point material. Can it really make any difference that the several things for which the mortgagee has bargained, and on the faith of which he has advanced his money, are lumped together in one single expression, if, in fact, they have a separate existence, or are capable of being dealt with separately? Brevity has its dangers or its advantages, if equity will absolve a man from his bargain merely because he has packed into a sentence or compressed into a word a description of particulars which might have been set forth at large and expanded under several heads or sub-divisions. This is a question, remember, between the original parties to the bargain. The contract cannot be avoided for the benefit of the mortgagor's creditors unless it is held not binding as between the mortgagor and the mortgagee. Even in an executory contract I apprehend it is not competent for the vendor to say "I cannot give you all I promised and so you shall have nothing." The purchaser is entitled to take what the vendor can give him, and as a general rule he is also entitled to a corresponding abatement in the price. But when the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a rule which should lay down that a man who has had the benefit of the contract may escape from its burthen merely because he has promised what he can perform and something more too, and promised it all in one breath, and in the most compendious language. Surely the other party to the contract ought to have a voice in the matter. He may, perhaps, think half a loaf better than no bread, especially when he has paid for the whole and the seller is not in a position to return any part of the price.

My Lords, when I find such a concurrence of opinion in favour of a view which seems to me to be contrary to equity, I may perhaps be forgiven for referring to one authority, a very old one,

(1) 35 Ch. D. 109; 36 Ch. D. 348.

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but none the worse, I think, for that. *Bettesworth* v. *Dean and Chapter of St. Paul's* (1) was decided in this House in 1728. The facts are rather complicated, but the point may be stated shortly. Before the disabling statute of Elizabeth the dean and chapter granted a lease for a long term with a covenant for renewal for ninety-nine years. In 1725 a bill was brought to enforce the covenant, or to compel the dean and chapter, who had had the benefit of the agreement, to grant a renewal for such a term as might by law be granted. The case was twice argued in Chancery. On the second occasion the Lord Chancellor was assisted by Raymond L.C.J. Jekyll M.R. and Price J. The Court (the Master of the Rolls dissenting) declared that the plaintiffs were not entitled to any relief either in law or equity; and so the bill was dismissed. On appeal, the objections which had prevailed in the Court below were repeated. It was urged that the grant of a lease for ninety-nine years was prohibited by the statute, and that the covenant was one entire covenant, which could not be varied or divided. "In answer to these objections," to quote the words of the report, which gives the arguments of counsel at length, but not the reasons for the judgment, "it was said to be a harsh way of reasoning, that because a person was now supposed to be prohibited from doing the whole of what he had agreed to do, he therefore should not do what was in his power and was lawful for him to perform, or to say that because part of a thing was taken away the whole must be so too, though part was still reserved; and in truth such construction and reasoning were apprehended to be inconsistent with the rules of equity." All the judges having been consulted, the House took that view, and it was ordered and adjudged that the decree should be reversed, and that the dean and chapter should make a new lease for forty years.

In the result, therefore, and for the reasons I have given, I am of opinion that the case of the respondent entirely fails. The original proposition is not, I think, well founded. If it were sound the conclusion attempted to be drawn from it could not, as it seems to me, be maintained.

I have, therefore, no hesitation in concurring in the motion which has been proposed.

(1) 1 Bro. P. C. 240.

LORD WATSON:—

My Lords, with reference to what fell from my noble and learned friend opposite (Lord FitzGerald), I desire to explain that I do not understand the present to be a test case in any other sense than this, that a question of some general importance is fairly raised by the actual facts, as these have been stated by the parties, in both Courts below as well as in this House. I purposely abstain from expressing any opinion upon the matters of fact discussed in the judgment of my noble and learned friend, because I am not satisfied that we have before us sufficient materials for their decision, and they were not referred to in the arguments of counsel.

LORD HERSCHELL:—

My Lords, I desire to express my concurrence with what my noble and learned friend on my left (Lord Watson) has said. I certainly did not understand this appeal to be a test case upon a question not raised by the facts. I did not enter into the discussion of the points raised by my noble and learned friend on my right (Lord FitzGerald) because they were not adverted to in the courts below, nor was any reliance placed upon them by any of the counsel at your Lordships' bar.

Order appealed from reversed; order of the Queen's Bench Division restored; the respondent to pay to the appellant his costs in the Court of Appeal and the costs of the appeal in this House; cause remitted to the Queen's Bench Division.

Lords' Journals 30th July 1888.

Solicitors for appellant: *Robinson, Preston & Stow for J. J. Bagnall, Birmingham.*

Solicitor for respondent; *Walter Murton, Solicitor, Board of Trade.*

[HOUSE OF LORDS.]

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THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY } APPELLANTS;

AND

THE NORTH CENTRAL WAGON COMPANY . . . . . } RESPONDENTS.

Bill of Sale—Invoice and Receipt—Mortgage—Assurance of Chattels—Hire and purchase Agreement—Bills of Sale Act 1878 (41 & 42 *Vict. c.* 31) *s.* 4 *—Bills of Sale Act* (1878) *Amendment Act* 1882 (45 & 46 *Vict. c.* 43) *s.* 9*—Railway Wagons—Hiring Agreement—Tolls—Lien of Railway Company—Railways Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 20) *ss.* 3, 97.

The B. Company, being in want of money and being in possession of certain wagons in which they had an interest, applied to the respondents who agreed to buy the wagons for £1000, and advanced that sum, £257 thereof being paid to the owners of the wagons and the rest, £743, to the B. Company. The respondents received from the B. Company an invoice for the wagons and a receipt for the £743, and from the owners of the wagons a receipt for the £257. At the same time the respondents leased the wagons to the B. Company for three years, at a yearly rent payable quarterly and calculated to replace the £1000 with seven per cent. interest, upon the terms that if all the payments were duly made the B. Company should have the option of purchasing the wagons at the end of the lease for a nominal sum, and that if the rent was not duly paid after demand the respondents should be entitled to repossess and enjoy the wagons as in their former estate, and that the agreement should thereupon cease and determine. The B. Company having made default in payment of the rent, the respondents claimed the wagons from a railway company into whose possession they had come, but were resisted on the ground that the transaction was void under the Bills of Sale Acts 1878 and 1882, the documents not being in the form prescribed by those Acts for bills of sale.

Held, affirming the decision of the Court of Appeal (35 Ch. D. 191), that the transaction was in fact a purchase by the respondents, and was not a mortgage by the B. Company or a security for the payment of money; that the documents in question were not bills of sale within the Bills of Sale Acts, but that even if they had been, the respondents had made an independent title to the wagons.

A railway company claimed under the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) s. 97 to detain wagons belonging to the

respondents for tolls due from the B. Company for the carriage of goods in the wagons:—

Held, affirming the decision of the Court of Appeal, that the claim could not be sustained under the earlier or the later part of sect. 97: not under the later, because the wagons did not belong to the persons from whom the tolls were due; not under the earlier, because that part of the section does not entitle a railway company to detain wagons for tolls due only in respect of the goods carried in such wagons.

APPEAL from a decision of the Court of Appeal.

The facts are set forth in the report of that decision (1), and more fully in the report of the decision of Bacon V.C. (2). For the present purpose they are sufficiently stated in the judgments of Lords Herschell and Macnaghten.

April 16, 17. *R. Henn Collins* Q.C. and *C. A. Russell* for the appellants:—

As to the point under the Bills of Sale Acts, the real nature of the transaction was not a purchase but an advance by the plaintiffs to the Blacker Company upon the security of the wagons of which the Blacker Company, and not the respondents, were the owners. The documents constituted in reality a bill of sale, and not being registered nor in the form required by the Act of 1882, the bill of sale was void and the whole transaction was void. If the parties to a transaction of this kind think it desirable for their own purposes to have a receipt, or an inventory, or any document of title, and make it a step in a transaction for giving security, it must conform to the Act. It is not only the form but the transaction which was avoided by the Act of 1878. The Act of 1882 enlarged the invalidity, making the bill of sale void not only as against execution creditors, &c., but also as between the grantor and the grantee. One of the authorities leading up to the Act of 1878 was *Allsopp* v. *Day* (3), where a receipt was held not to be a bill of sale within the Act of 1854, 17 & 18 Vict. c. 36. So in *Woodgate* v. *Godfrey* (4) where a receipt and inventory given by a sheriff's officer for the price of goods sold under an execution was held not to be within the Act of 1854. The Act of 1878 (41 & 42 Vict. c. 31) made bills of

(1) 35 Ch. D. 191.
(2) 32 Ch. D. 477.
(3) 7 H. & N. 457.
(4) 5 Ex. D. 24.

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sale include "inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels." Then came *Marsden* v. *Meadows* (1) following *Woodgate* v. *Godfrey* (2). The facts in the present case resemble not those in the two last cited decisions, but those in *Ex parte Odell* (3); *Cochrane* v. *Matthews* (4); and *Ex parte Cooper* (5), in each of which cases it was held that an inventory of goods with a receipt for purchase-money attached was a bill of sale within the Act of 1854. The first two of these three cases shew that several documents may constitute a bill of sale. Nor does the existence of a hiring agreement alter the real nature of the transaction: *Ex parte Odell* (6), and see *Ex parte Crawcour* (7). Even where the only document is a demise of chattels it is or may be a bill of sale: *Phillips* v. *Gibbons* (8). See also *Ex parte Parsons* (9), and *Ex parte Hubbard* (10) upon the effect of the Act of 1882. A document providing for the payment of money—though not as a loan—may be a bill of sale: *Hughes* v. *Little* (11).

As to the second point, the right of detainer and sale given by the first clause of sect. 97 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) is alternative on both carriages and goods, i.e. on carriages for toll of goods and on goods for toll of carriages (12). At common law a carrier has such a lien. Sect. 97 must be read with sects. 98 and 101. The construction adopted by the Court of Appeal gives no meaning to the word "carriages," for the appellants' special Act gives no toll on carriages.

(1) 7 Q. B. D. 80.
(2) 5 Ex. D. 24.
(3) 10 Ch. D. 76.
(4) 10 Ch. D. 80, n.
(5) 10 Ch. D. 313.
(6) 10 Ch. D. 76.
(7) 9 Ch. D. 419.
(8) 5 W. R. 527.
(9) 16 Q. B. D. 532.
(10) 17 Q. B. D. 690, 700.
(11) 18 Q. B. D. 32.
(12) Sect. 97: "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law."

The toll is not a payment due on the carriage or on the goods, it is a charge for the use of the railway; s. 3. The construction contended for by the appellants has the authority of a dictum of Parke B. upon a similar enactment in *Jenkins* v. *Cooke* (1). In *Field* v. *Newport &c. Railway Company* (2) it was assumed on a similar clause that the lien extended to carriages, though the decision turned on the question of demand. These are the only authorities bearing upon the question. Under the first part of sect. 97 there was therefore a right to detain the wagons whoever was the owner. But even if this be otherwise, under the second part of that section the appellants had a right to detain the wagons since they belonged to the Blacker Company; at all events that company had an interest in the wagons, and the appellants were entitled to detain the wagons and sell such interest.

The House took time for consideration without hearing

Rigby Q.C. and *Phipson Beale* Q.C. for the respondents.

July 30. LORD HERSCHELL:—

My Lords, at the conclusion of the able arguments for the appellants, all your Lordships, I believe, were of opinion that they had not succeeded in establishing any of the objections taken to the judgment of the Court below, and subsequent consideration of the case has confirmed the opinion I had then formed.

The action was brought against the defendant company, who were the appellants at your Lordships' bar, in respect of the detention of certain wagons alleged to be the property of the respondents. The appellants denied, as they were entitled to do, that the respondents were the owners of the wagons and put them upon proof of their title. They also asserted a right to detain the wagons, even if they were the property of the respondents, as security for moneys due from a firm trading as the Blacker Main Coal Company. Whether they have succeeded in making good either of these defences is the matter to be deter-

(1) 1 Ad. & E. 372, n., 375. (2) 3 H. & N. 409.

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mined. The two questions involved are entirely distinct and depend upon different considerations.

I will take first the question whether the respondents made out that they had any property in the goods which would entitle them to maintain this action.

It appears that, the Blacker Company being in want of money in the month of February 1884, it was agreed between them and the respondents that the latter company should purchase for the sum of £1000, 100 wagons in which the Blacker Company had an interest. It was at the same time agreed that the respondents should lease these wagons to the Blacker Company for three years from the 1st of March 1884 at the yearly rent of £372 10*s.*, payable quarterly, and that if all these payments were duly made the Blacker Company should have the option of purchasing all or any of the wagons at 1*s.* per wagon. And it was further agreed that if the rent was not duly paid after demand the respondents should be entitled to re-possess and enjoy the wagons as of their former estate.

The wagons were originally the property of the Sheffield Wagon Company, and had been leased to the Blacker Company under an agreement which gave the latter company the right to become at the end of the term owners of the wagons, provided they made all the payments which by the lease they contracted to make. It was in short what is known as a hire and purchase agreement. The Blacker Company had at the time of the agreement with the respondents, the particulars of which I have mentioned, made default in paying some of the stipulated instalments, and the Sheffield Company were thereupon in a position to dispose of the wagons without regard to the Blacker Company. They had, however, intimated that they were willing to give up their title to the wagons on receipt of £257, the sum still remaining due under their agreement. But it is clear that the wagons were then their property, and not the property of the Blacker Company. Under these circumstances it was agreed that the respondents should pay the £257 direct to the Sheffield Company and the sum of £743 (making in all £1000) to the Blacker Company.

The £257 was accordingly subsequently transmitted by cheque payable to the order of the Sheffield Company, and a receipt was

given by them to the respondents. The £743 was also on the 18th of February paid to the Blacker Company, and acknowledged by a receipt in the following terms:

"Received of the North Central Wagon Company cheque value £743, which is placed to your credit, with thanks.

"p. pro. The Blacker Main Coal Company,

"Jno. Malleson."

The Blacker Company had two days before the receipt I have just alluded to sent to the respondents an invoice in the following terms:—

"Messrs. The North Central Wagon Company, Rotherham.

"Dr. to the Blacker Main Coal Company.

"1884 Feby. 18.	To 100 wagons, Nos. 1 to 100, and bearing Sheffield Wagon Company's plate, Nos. 8675 to 8774, and marked:— The Blacker Main Coal Company . .	£1000
Feby. 19.	Cr. by cheque payable to Sheffield Wagon Company	257
		£743"

In further pursuance of the agreement between the parties a lease of the wagons containing the agreed terms was executed on the 18th of February.

Subsequently to the receipt of the money by the Sheffield Company their name plates indicating that they were the owners were removed from the wagons, and plates bearing the respondents' name were substituted. They thus became the ostensible owners of the wagons, which however remained in the possession of the Blacker Company, and were used by them in their business.

Under these circumstances, apart from the question raised as to the effect of the Bills of Sale Acts, it is impossible to deny that the respondents proved a sufficient title to the wagons to enable them to maintain this action.

It is said, however, that the transaction was in reality a loan upon the security of the wagons, and that the documents which passed, and by which it is said the arrangements were carried out, or some or one of them, amounted to a bill of sale within the

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meaning of sect. 9 of the Bills of Sale Act 1882, and were by that Act rendered void.

That section provides that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed," and certainly none of the documents with which we have to deal were in that form.

Before considering the nature of these documents I have to observe that the transaction between the parties was not in my opinion really a loan upon security of the wagons. It differed materially in its incidents from such a transaction. If e.g. the Blacker Company had made default after payment of some of the quarterly sums prescribed by the agreement of lease and the respondents had taken possession of the wagons and sold them for a sum which, with these payments, exceeded £1000 and interest, the Blacker Company would have had no claim to an account and payment of the surplus.

The Bills of Sale Act 1882 contains no definition of a bill of sale. For that we are thrown back to the earlier statute, viz., the 4th section of the Act of 1878, which enacts that "the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods and other assurances of personal chattels." It must be borne in mind that the object of the earlier Bills of Sale Acts was entirely different from that of 1882. The former enactments were designed for the protection of creditors, and to prevent their rights being affected by secret assurances of chattels which were permitted to remain in the ostensible possession of a person who had parted with his property in them. The bills of sale were therefore made void only as against creditors or their representatives. As between the parties to them they were perfectly valid. The purpose of the Act of 1882 was essentially distinct. It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of harsh and unreasonable provisions. A form was accordingly provided to which bills of sale

were to conform, and the result of non-compliance with the statute was to render the bill of sale void even as between the parties to it. But, this being the object, the enactment is, as we have seen, limited to bills of sale given "by way of security for the payment of money by the grantor thereof."

It will not avail the appellants therefore to shew that the documents or any of them fall within the definition of the Act of 1878, unless they can establish that they are also within the enactment I have just quoted.

There are only three documents to be considered: the lease of the 18th of February, the inventory, and the receipt. I may at once put aside the first of these. The grantors of it were the respondents, and it certainly was not given by way of security for the payment of money by them. Again the inventory was certainly not an inventory of goods "with receipt thereto attached." There remains the receipt. I think it would be an abuse of language to say that this was given by way of security for the payment of money by the grantors thereof. In my opinion it was, and was intended to be, an acknowledgment that the Blacker Company had received £743 and nothing more than that.

I may add that even if the appellants could have made out that this document was a bill of sale and therefore void, they would still have had serious difficulties to contend with. It does not appear to me to follow that it would have avoided the whole agreement between the parties and deprived the respondents of all title to the wagons, the more so as the Blacker Company were not, as I have pointed out, the legal owners of the wagons, the title of the Sheffield Company having only been given up on receipt from the respondents of £257, which, as far as I can see, they could never recover from the Sheffield Company, even if the appellants' contention were sustained.

Upon this part of the case therefore I have no hesitation in advising your Lordships to affirm the judgment of the Court of Appeal.

I pass now to the other point. The facts bearing upon it may be very shortly stated. The appellants had hauled along their lines the wagons in question as well as others containing coal

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belonging to the Blacker Company. A considerable sum was due in respect of their services from the Blacker Company to the appellants, a part of which related to the carriage of coal in these particular wagons. Between the 19th of February and the 16th of March 1885 the appellants took possession of them claiming to detain them by virtue of the powers given them by sect. 97 of the Railways Clauses Consolidation Act 1845.

On or before the 19th of March 1885 certain of the sums due from the Blacker Company to the respondents under the agreement of February 1884 were unpaid, and they accordingly demanded them, and gave notice that in default of payment they would exercise the powers, to which I have called attention, of repossessing themselves and putting an end to the agreement.

The section relied on by the appellants as justifying the detention of the wagons provides that if on demand any person fail to pay the tolls due in respect of any carriage or goods it shall be lawful for the company to detain and sell such carriage or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls and expenses.

The appellants rest their claim on both parts of this enactment. I will deal first with the latter part of the section. To bring themselves within it the appellants must establish that the carriages they seek to detain belonged to the party liable to pay the tolls, i.e., to the Blacker Company. In my opinion they clearly did not. The appellants therefore, in order to succeed must shew either that if tolls are due in respect of goods they have a right to detain and sell the carriage in which the goods were carried, whoever it may belong to, or that tolls were due in respect of the wagons which they detained. I do not think they can maintain either contention. Unless compelled I would certainly not put a construction upon the section which would give the railway company the option of parting with the goods of their debtor and detaining and selling the wagon which was not his property. And I do not think this is the natural

construction of the language used. I think the right conferred is to detain that in respect of which the toll is payable, be it carriage or goods. And it seems to me clear that no toll was due in respect of these wagons. The special Act of the company, with which the Railways Clauses Act is incorporated, shews to my mind conclusively that the tolls were due only in respect of the coal and not of the wagons in which it was carried.

Upon this point also I entirely concur with the Court below, and I move your Lordships accordingly that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I also am of opinion that no cause has been shewn for disturbing the judgment of the Court of Appeal.

I had the advantage, some time ago, of considering in print the judgment prepared by my noble and learned friend, Lord Macnaghten, and finding there all the reasons which had occurred to me for affirming the judgment under appeal, I do not propose to repeat them. I have only to add that I fully concur in the views which have just been expressed by my noble and learned friend on the woolsack.

LORD FITZGERALD:—

My Lords, at the hearing of the cause, when once it appeared that the respondents upon the payment of a sum of £257 at the request of the Blacker Company to the Sheffield Company had acquired the rights of the Sheffield Company to the wagons in question, I thought there was an end of the case on the main defence. That defence in substance, though not in terms, alleged that the plaintiffs in the action (the present respondents) had not that property in the nine wagons in question which would enable them to maintain that action. That defence utterly failed when once that matter of fact was made clear.

My Lords, I do not intend to go in any detail into the reasons, but I concur in the motion, at the same time agreeing with the judgment which has been delivered by the noble and learned Lord on the woolsack, that even if we were of opinion that the

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subsequent documents amounted to a bill of sale, still it would not displace the title of the respondents. They still put forward and rest upon the title of the Sheffield Company. But I am further of opinion, for the reasons which have been given, that the subsequent documents did not amount to a bill of sale and were not in the least degree invalid.

With regard to the question of the lien for tolls, there never was in my mind the slightest doubt on the subject. I adopt the reasons which have been given by the noble and learned Lord on the woolsack, and I agree with him that no cause has been shewn why we should alter or disturb the judgment of the Court of Appeal.

LORD MACNAGHTEN:—

My Lords, it seems to me that this case depends much more on matters of fact than on questions of law. Indeed, I think there is scarcely room for any question of law when the facts are ascertained. This must be my apology for recurring to the evidence, which I will do as shortly as possible.

In February 1884, a colliery company called the Blacker Main Colliery Company were in possession of 100 wagons which had been let to them by the Sheffield Wagon Company under the usual purchase hire agreement. The property in the wagons belonged to the Sheffield Company, and each wagon bore a name-plate designating them as owners. The Blacker Company had paid up the greater part of the instalments payable under the agreement. But at the time they were behindhand with their payments and actually in default. They were in want of money and desirous of obtaining an advance in some shape or other. Apparently they applied to the Sheffield Company for assistance. But that company were about to retire from business and were unable or unwilling to assist them.

Under these circumstances the secretary of the Sheffield Company, not perhaps wholly from disinterested motives, introduced them to the respondents. The respondents were also a wagon company. The objects for which they were established included the business of buying wagons and of letting, selling and supplying wagons to coal proprietors. They were therefore in a position to

help the Blacker Company if they chose to entertain their proposal. If they bought the wagons at the instance of the Blacker Company with an understanding that the Blacker Company should then buy the wagons from them under a purchase hire agreement, the transaction would be one in the ordinary course of their legitimate business, and if the terms suited the Blacker Company the arrangement would give that company the accommodation they desired.

The Blacker Company wanted £1000 to pay off the Sheffield Company and to put themselves in funds. The respondents inspected the wagons and agreed to find the money. With part they paid off the claim of the Sheffield Company, amounting in all to £257. For this they drew a cheque payable to the order of the Sheffield Company. Then they gave the Blacker Company a cheque for £743, making up the sum of £1000 as and for the purchase-money for the wagons. As part of the arrangement they relet the same wagons to the Blacker Company for three years on the usual purchase hire agreement, at a rent payable quarterly, and calculated to repay the £1000 with interest at the rate of 7 per cent. per annum. Some time afterwards the name plates of the Sheffield Company were removed and replaced by those of the respondents.

The documents which passed between the Blacker Company and the respondents were the following:—1. An invoice, dated the 18th of February 1884, debiting the respondents with the 100 wagons at £1000, but crediting them with their cheque for £257, payable to the Sheffield Company. 2. A receipt dated the 20th of February 1884, expressed to be for cheque value £743, but not on the face of it referring to the wagons or to the terms of the purchase. 3. The purchase hire agreement, which was dated the 18th of February 1884.

The assistance afforded by the respondents did not prove of any lasting benefit to the Blacker Company. In February 1885 they were compelled to call their creditors together. On the 19th of March 1885, two quarters' rent for the wagons being then due, the respondents served them with formal notice that unless the amount were paid by the 23rd of March they would take possession of the wagons and put an end to the agreement. The

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amount due was not paid, and accordingly the respondents proceeded to carry out their threat. They took possession of all the wagons with the exception of nine. Those nine were detained by the appellants for tolls alleged to be due to them by the Blacker Company. In that state of things the respondents brought this action against the appellants, claiming the nine wagons as their absolute property.

In answer to the claim the appellants raised two points. In the first place they insisted that the respondents had no title to the wagons at all; they contended that the real transaction was an advance by the respondents to the Blacker Company of £1000, on the security of the 100 wagons, and that the documents which passed between the respondents and the Blacker Company amounted to a bill of sale, and a bill of sale "given by way of security for the payment of money by the grantor thereof," and so void as not being in accordance with the form prescribed by the Bills of Sale Act (1878) Amendment Act 1882. In the second place they contended that, under the 97th section of the Railways Clauses Consolidation Act 1845, they were entitled to detain and sell the wagons.

The first contention on the part of the appellants is a very singular one from every point of view. If I am right as to the result of the evidence, it is entirely beside the question. If the appellants could succeed in proving that the documents which they allege to be a bill of sale were void, and could even sweep away the whole transaction evidenced by those documents, they would not defeat the title of the respondents. At the time when the respondents came forward to assist the Blacker Company, the property in the wagons belonged to the Sheffield Company. They and they alone were the owners. The Blacker Company had no equity of redemption. They had no equitable rights whatever. At the utmost, assuming the lease not to have been forfeited, they had a contingent interest liable to be defeated by non-compliance with the terms and conditions of the lease. Whatever else may be doubtful, it was clearly the intention of the parties that that interest should be determined. The property in the wagons passed directly from the Sheffield Company to the respondents. The cheque no doubt went through the

hands of the Blacker Company. It was thought that they might get some discount or allowance on handing it over. But the cheque was drawn to the order of the Sheffield Company. It was placed in the hands of the Blacker Company for a specific purpose. They had no power to deal with it in any way except by handing it to the Sheffield Company, as the money of the respondents, appropriated to the purchase of the wagons on their behalf. It follows, therefore, that if the rest of the transaction of which that payment was part were entirely avoided there would be nothing to interfere with the title of the respondents.

In the next place, the transaction between the Blacker Company and the respondents was in no sense a security for the payment of money. It would not have been a security for the payment of money if the title derived from the Sheffield Company had been out of the way. There was no loan, no debt, no mortgage. When the respondents took possession of the wagons in the exercise of the rights reserved to them, the agreement was at an end. The Blacker Company could not have redeemed the wagons. If the wagons had fetched twice the amount of the instalments then remaining unpaid, the Blacker Company would have been none the better, and they would still have continued liable for the arrears. If the wagons had not been worth sixpence, the respondents could not have claimed from the Blacker Company anything beyond the arrears of rent then actually due. The appellants say that all the three documents which they call a bill of sale are wrong. They say that the secretaries of the two companies are both mistaken. Their whole case rests on one or two ambiguous expressions found in the correspondence. The correspondence speaks of the Blacker Company wanting £1000 on the wagons; well, so they did. The Blacker Company called it "financing the wagons," an expression equally apt or inappropriate whether they had a mortgage in view or an absolute sale with a conditional right of repurchase attached to it. As regards their legal incidents, there is all the difference in the world between a mortgage and a sale with a right of repurchase. But if the transaction is completed by redemption or repurchase as the case may require there is no

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difference in the actual result. The Blacker Company of course looked forward to repaying the money. There was nothing, therefore, so very improper or suspicious in their entering the transaction in their books as a loan. When it was put to the secretary of the Blacker Company, "You have said that it was not handed to you as a loan of £1000, but that it was paid for the wagons" he answered naturally enough, and not I think altogether incorrectly, "Well, it was paid for the wagons, but you might call it a loan for all that."

There is very little in the circumstance that the value of the subject dealt with was not a matter of nice bargaining at the date of the transaction. The right of repurchase must be taken into the account if the consideration is to be fairly estimated. There is nothing in the respondents saying a year afterwards that they did not want the wagons on their hands at any price. Of course they did not. They bought to sell not to keep in stock. They would not, I suppose, have bought these second-hand wagons at all if they had not seen their way clear to dispose of them on advantageous terms.

In all these cases the question is what was the real intention of the parties? As Lord Cranworth observed in a case where the documents were of a more formal character, "The rule of law on this subject is one dictated by common sense, that primâ facie an absolute conveyance, containing nothing to shew that the relation of debtor and creditor is to exist between the parties, does not cease to be an actual conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase": *Alderson* v. *White* (1).

My Lords, as I have come to the conclusion that this transaction was not a security for the payment of money it would not, perhaps, be a very profitable inquiry to consider, whether, under other and different circumstances, the documents in question could be treated as a bill of sale under the Act of 1878. It is enough to say that in my opinion it is difficult to see how a receipt like that in the present case could be "a receipt for purchase-money of goods" within the meaning of the Act, or how an invoice and a receipt, which are separate instruments, and

(1) 2 D. & J. 105.

not intended to be operative in connection with each other, could be regarded as an "inventory of goods with receipt thereto attached." And I may add that I see no reason to doubt that "receipts for the purchase-money of goods" and "inventories of goods with receipt thereto attached" must be assurances of personal chattels to fall within the category of bills of sale, to which the Act of 1878 applies.

It would, I think, be equally unprofitable to review the authorities which were cited to your Lordships, and which are very fully discussed in the judgment of the Court of Appeal. I only wish to make one observation: I rather venture to doubt whether the line of demarcation between the three cases of *Cochrane* v. *Matthews* (1), *Ex parte Odell* (2), and *Ex parte Cooper* (3), and the other cases cited by Bowen L.J. is quite so strong as that learned judge seemed to think. I rather doubt whether those three cases indicate a separate current of authority. *Ex parte Cooper* (3) stands by itself, and must be taken with the explanation given by Sir George Jessel M.R. in *Woodgate* v. *Godfrey* (4). But I should be sorry to throw any doubt on the decision in either of the other two cases, though there may be some expressions in the judgments that require qualification. The documents in those two cases, as appears from the statement of counsel in *Ex parte Odell* (2), were word for word the same. In each case there was a loan and a debt. In each case the transaction was plainly a mortgage and not a sale with a conditional right of repurchase.

My Lords, as regards the second branch of the appellant's argument, it seems to me that their case falls to the ground when once it is established that at the date of the writ the wagons belonged to the respondents. It is more than doubtful whether any tolls were due for the wagons. It would seem that tolls were charged only for the goods carried in the wagons. But be that as it may, it is, I think impossible to contend that the 97th section of the Railways Clauses Consolidation Act 1845 could justify the appellants in detaining wagons belonging to the respondents for tolls due from the Blacker Company.

(1) 10 Ch. D. 80, n.
(2) 10 Ch. D. 76.
(3) 10 Ch. D. 313.
(4) 5 Ex. D. 24.

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For these reasons I concur in thinking that the appeal should be dismissed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 30th July 1888.

Solicitors for appellants: *Cunliffes & Davenport for R. Lingard Monk, Manchester.*

Solicitors for respondents: *Ridsdale & Son for G. T. Barras, Rotherham.*

[HOUSE OF LORDS.]

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THE BOARD OF TRADE . . . . . APPELLANTS;

AND

HENRY JOHN BLOCK . . . . . RESPONDENT.

Bankruptcy—Examination of Debtor's Property—Duty of Debtor to aid in Realisation of Property—Insurance of Debtor's Life—Submission to Medical Examination—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52) *ss.* 24, 28.

The principal asset of a bankrupt was a contingent reversionary interest which was saleable if the bankrupt's life were insured. The trustee having requested the bankrupt to submit to a medical examination with a view to a policy being effected, the bankrupt refused to do so without giving any reason, although he had not long before his bankruptcy submitted to such an examination for the purpose of raising money on his interest, and although he admitted that since then he had contracted no disease, and that he knew of no reason why he should not submit to such an examination:—

Held (Lord FitzGerald dissenting), that the obligation imposed upon a bankrupt by sect. 24 of the Bankruptcy Act 1883 to "do all such acts and things in relation to his property, and the distribution of his property among his creditors, as may be reasonably required by the trustee" and to "aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors," did not include an obligation to submit to a medical examination, and that the refusal to submit was not a ground upon which the bankrupt's discharge could be refused or suspended under sect. 28.

The decision of the Court of Appeal (19 Q. B. D. 39) affirmed.

APPEAL from a decision of the Court of Appeal, reported as *In re Betts & Block, Ex parte The Board of Trade* (1).

(1) 19 Q. B. D. 39.

Block, the present respondent, was adjudicated bankrupt in October 1885. The principal asset to which he was entitled was a reversionary interest in a legacy of £2000, contingent upon his surviving his mother, his age being about twenty-four, and his mother's about sixty-eight. The trustee in bankruptcy had an offer from an insurance company for the purchase of this reversion conditionally on the bankrupt passing the usual medical examination with a view to a policy on his life being effected. At a private examination held in July 1886 the bankrupt refused to sign the necessary requisition to the insurance office and to submit to a medical examination for the purpose of realising this reversionary interest. In answer to questions the bankrupt stated that he declined to give any reason for his refusal, and that he had not had any disease which would make it more difficult to insure his life since June or July 1885, at which date he had signed a requisition to an insurance office and submitted to a medical examination for the purpose of raising a loan upon the reversionary interest. That proposal was accepted by the insurance office, but the loan was not carried out. Further pressed, the bankrupt admitted that he did not think there was any reason why he should not now do as he had done on that occasion, but he still refused.

The bankrupt having applied for his discharge, the official receiver reported that in order to effect a sale of the reversionary interest, the trustee had called upon the bankrupt to sign a requisition and submit to a medical examination with a view to effecting a policy on his life; that the bankrupt refused to do this and to that extent had failed to aid to the utmost of his power in the realisation of his property. The registrar made an order suspending the bankrupt's discharge for six months upon grounds not connected with the refusal of the bankrupt to comply with the trustee's request, and declined to take that refusal into consideration in determining the question of suspending or refusing the discharge.

The Court of Appeal having been moved on behalf of the Board of Trade and the trustee that the registrar's order might be discharged or varied, and that in lieu thereof an order might be made either refusing the order of discharge or granting the

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same, subject to such condition concerning the future earnings or income of the bankrupt or his after-acquired property as to the Court should seem fit, the Court (Lord Esher M.R. and Lopes L.J., Fry L.J. dissenting) dismissed the appeal (1).

Against this decision the Board of Trade brought the present appeal.

June 8. Sir *R. E. Webster* A.G. and *M. Muir Mackenzie* (Sir *E. Clarke* S.G. with them) for the appellants :—

The reversionary interest was saleable only if the bankrupt's life was insured. The bankrupt could not make use of it himself, and it was the trustee's duty to realise the assets. The refusal of the bankrupt to submit to a medical examination was, upon his own admission, wholly unreasonable : it was not as if the insurance could have affected his health or his prospects ; he does not even suggest nervousness as an excuse. He is not in substance asked to do anything more than sign a statement that what he said in July 1885 is true now. When he said then was for his own benefit : why should he not say it now for his creditors' benefit ? Such a refusal is misconduct, which at all times under the bankruptcy law would enable the creditors to refuse a bankrupt's discharge. From the earliest days creditors have had a large discretion as to granting a discharge : *Selkrig* v. *Davis* (2), per Lord Eldon. It comes expressly within the provisions of the Bankruptcy Act 1883 ss. 24 and 28 (3). Under sect. 24 sub-

(1) 19 Q. B. D. 39.

(2) 2 Rose, 291, 312.

(3) The Bankruptcy Act 1883 s. 24 :—

"(1.) Every debtor against whom a receiving order is made shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require.

"(2.) He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special

sect. 2 the bankrupt is to execute such deeds and instruments (e.g. sign the requisition to the insurance office) and generally to do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the trustee, &c. The request to sign the requisition and submit to the examination was a reasonable requirement by the trustee, and it certainly is an act or thing in relation to his property and the distribution of the proceeds. Again, it comes within the words of sub-sect. 3, "aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds." Those words mean that the bankrupt shall take active steps, e.g. do for his creditors what he would have done, and in fact had previously done, for his own benefit. He is not asked to create a new asset, only to take a reasonable step towards enhancing the value of an existing asset.

Sect. 28 gives the Court power to refuse or suspend the discharge, or to grant it upon conditions, and the Court is to take into consideration the official receiver's report as to the bankrupt's "conduct and affairs." That means conduct during as well as before the bankruptcy, and should not be narrowed to conduct

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application by the official receiver, special manager, trustee, or any creditor or person interested.

"(3.) He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds among his creditors.

"(4.) If a debtor wilfully fails to perform the duties imposed on him by this section, or to deliver up possession of any part of his property, which is divisible amongst his creditors under this Act, and which is for the time being in his possession or under his control, to the official receiver or to the trustee, or to any person authorized by the Court to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court, and may be punished accordingly."

Sect 28: "(1.) A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall be heard in open court.

"(2.) On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property . . . ."

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before the bankruptcy, as it was in the Court of Appeal. The words of sect. 28 are very wide and general and give a large discretion to the Court. Even if it were not misconduct within sect. 24, sect. 28 would cover the present case. The order which the registrar should have made and which this House is now asked to make is to refuse the discharge or to suspend it till the bankrupt complies with the request of the trustee. The same point arose under the Act of 1869 in *In re Garnett, Ex parte Bullock* (1), and the decision of Cave J. in that case should be overruled. This is not like the case of *Walker* v. *Mottram* (2), for the future right of trading is not and never was an asset.

The respondent was not represented.

The House took time for consideration.

Aug. 9. LORD HALSBURY L.C.:—

My Lords, this question turns on the true construction of two sections in the last Bankruptcy Act, and may be shortly stated to be whether a refusal by a bankrupt to submit himself to examination by a medical man, so that the trustee in bankruptcy may effect an insurance on his life, and thus put the trustee in a better position to sell and realise a reversionary interest which was in the bankrupt, is such conduct as would have justified the registrar in refusing an application for the discharge of the bankrupt.

If it were open to me to pass judgment upon the bankrupt as to the moral propriety of his conduct, I should say that his refusal was unreasonable. Before the bankruptcy the bankrupt himself had sought to raise money upon this very reversionary interest, and he had submitted himself to a medical examination with the view of obtaining a policy of insurance. From that time to the time when application was made to him by the trustee, the bankrupt himself expressed his belief that he had contracted no disease since the time when he submitted himself to examination, and I proceed on the assumption that there was no reason personal to himself, either in respect of nervousness, or

(1) 16 Q. B. D. 698. (2) 19 Ch. D. 355.

any other matter, which induced him to refuse. But it appears to me that if the act is one which within the meaning of the Act of Parliament is of the class of acts contemplated, personal feelings, nervousness, or state of health of the bankrupt would be no answer to the demand that he should do it, since I think the word "reasonable" has relation to the nature of the act in relation to property, and does not limit the obligation of the bankrupt. But I am of opinion that the act is not one included within the class. I agree with the Master of the Rolls that this act is not to be done to distribute the property, but to add a new value to that property, and then to distribute that new value.

It was avowed in the argument that the construction sought to be put upon the statute was that it was intended to create new duties in the bankrupt; that he might be called upon to plough part of his farm, or ride his horse, or shew his goods in the event of the trustee requiring him to facilitate and improve a sale of his effects. I am unable to acquiesce in any such construction. I think the plain meaning of the statute can be gathered by the different classes of acts that it specifies, and I am unable to give the effect to the word "generally" which Fry L.J. seems to attribute to it. Although the word "generally" is there, the acts must be in relation to his property and the distribution of the proceeds among his creditors. The words are undoubtedly large, as in any view of the construction of the statute they require to be, but to my mind this is not an act in relation to his property and the distribution of the proceeds among his creditors.

I adopt the reasoning of Lord Esher and Lopes L.J., and of Cave J. in *In re Garnett, Ex parte Bullock* (1), and I therefore move your Lordships that the order appealed from be affirmed, and this appeal dismissed.

LORD WATSON:—

My Lords, whatever may be my personal opinion as to the conduct of Mr. Block, I venture to think that the legislature

(1) 16 Q. B. D. 698.

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would hesitate to inflict upon a bankrupt the imperative duty of submitting to a medical examination at the instance of his creditors. It is sufficient, however, for me to say that, for the reasons which have been already assigned by the Lord Chancellor, I am of opinion that the legislature has not done so in the Bankruptcy Act of 1883.

LORD FITZGERALD:—

My Lords, at the hearing of this appeal I entertained considerable difficulty as to the decision to be arrived at, and I am not yet free from doubt. The case has been properly brought before the House by the Board of Trade, as it presents the question to be decided in such a form as calls for your Lordships' authoritative and final decision.

The bankrupt in the schedule of his property describes as part of his assets, "A contingent reversion to a legacy of £2000 left to me under the will of my father John Block, who died on the 16th July 1884. The legacy is subject to my surviving my mother. I am twenty-three years of age. My mother is sixty-five or sixty-seven years of age."

There is no doubt that under sect. 44 and the definition of property in sect. 168 this contingent interest vested in the trustee in bankruptcy as part of the bankrupt's estate to be realised and divided amongst his creditors. It may further be said that it was in effect the only available asset. The ordinary course in the realisation of such a security, and indeed the only mode to make it really available, is to provide against total loss on an unfavourable termination of the contingency by an indemnity policy of insurance. Without such an indemnity the contingent interest may be of very small value and possibly wholly unsaleable.

The trustee having found a purchaser of this contingent asset, at a price which would realise £800 net for the estate, in the execution of his duty called on the bankrupt to sign a requisition for a policy *on his life* and to attend for medical examination. The bankrupt refused to do so, and assigned no reason for his refusal. The other circumstances of the case preclude us from coming to any other conclusion than that the refusal was,

considering it independent of the statute, entirely unreasonable and very unjust towards his creditors.

The official receiver reported "That in order to effect a sale of that reversionary interest the trustee has called upon the said H. J. Block to sign a requisition and submit to a medical examination with a view to effecting a policy on his life; this the said bankrupt, H. J. Block, has refused to do, and to that extent has failed to aid to the utmost of his power in the realisation of his property."

There is no distinction in circumstances between this case and *In re Garnett, Ex parte Bullock* (1), decided by Cave J. in 1885, save that the bankruptcy in the latter case was under the Act of 1869. The decision, however, is not exactly in point. The registrar in bankruptcy, acting on the decision of Cave J., declined to take the bankrupt's refusal into consideration on the application for his discharge, and the Court of Appeal by a majority has affirmed his ruling.

The question, which is one of law, is to be decided on the construction of sect. 24 of the Act of 1883. That section is a modification of sect. 19 of the Act of 1869. There is no case reported as having arisen on sect. 19 until the case before Cave J., which was not decided until 1885.

My Lords, the abstract questions arise on two provisions of the 24th section. The debtor is bound, that is, has a duty cast on him by that section, to (1) "do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the official receiver;" (2.) "He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds amongst his creditors." The first provision applies to every debtor against whom a receiving order shall have been made, and the second only if he shall be adjudged bankrupt. The debtor here comes within both provisions. A receiving order had been made against him and he was subsequently adjudged bankrupt on his own consent.

In the case before Cave J. the application was to compel the bankrupt to answer in writing certain questions necessary for

(1) 16 Q. B. D. 698.

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effecting a policy on her life and also to submit to a medical examination. The decision of the judge was that the Act of 1869 did not authorize the examination of the bankrupt with a view to the insurance on her life. It goes no further.

The decision of the majority of the Court of Appeal in the present case, as revised, and as reported in 19 Q. B. D., does not seem to me to be clear or satisfactory, and appears to rest on this: that the act which the bankrupt was required to do was not one "in relation to his property" within the meaning of the provision in sect. 24 which I have described as No. 1. The Master of the Rolls says, at pages 42 and 43, speaking of a policy which it was endeavoured to effect, "That policy if it were effected would never be the bankrupt's property. It would be the property of the trustee, and it would be effected in order to be sold or assigned to the purchaser of the reversionary interest so as to add a value to that. Therefore the bankrupt is required to do this act for the formation or invention of a piece of property which would not be his at the time when it was made or at any time afterwards. The policy is no part of his property, and therefore what he is asked to do in relation to that policy is not anything in relation to his property or the distribution of it, and so cannot be brought within this section."

My Lords, I have not failed to see that there is difficulty in coming to the conclusion that the very act which the bankrupt was required to do was an act "in relation to his property." But let us see what that act exactly was. It is stated clearly in the letter of the 20th of May 1886 which is as follows:—"20th May 1886. H. J. Block's reversion. I have again submitted your proposal for the sale of this reversion to the directors, and having regard to the now correctly ascertained age of the life tenant, they are prepared to offer the sum of £1003 13*s.* 4*d.* for it, provided the reversioner's life is proved to be insurable at the tabular rate, and the single premium of £203 13*s.* 4*d.* on an assurance of £2000, payable in the event of his predeceasing his mother, be deducted therefrom, and the solicitor be satisfied. In other words the sum of £800 is offered.—G. Scott Freeman, secretary."

The policy was not to be a policy on the life of the bankrupt in the ordinary sense, but a policy for the benefit of the pur-

chasers to indemnify them against the contingency of the bankrupt predeceasing his mother. It was an act in respect of and having relation to his contingent estate; and if it was necessary for the decision of the case I should come to the conclusion with Fry L.J. that it was "an act to be done in relation to his property," and reasonably required by the trustee. The legislature in its apparent anxiety to provide for all such cases in sect. 24 enlarges the scope of the previous part of the section by the words "or be directed by the Court by any special order made in relation to any particular case, or made on the occasion of any special application by the receiver, special manager, trustee, or any creditor or person interested."

But we have now to consider sub-sect. 3 of sect. 24. "He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property." What does "realisation" here mean? I should say it has the same meaning as it would have in any of the everyday transactions of life. If you speak of realising stocks or securities, or give your broker instructions to do so, what is meant by realising? Nothing more than their sale and conversion into money at the highest price that can reasonably be obtained. It means that at least in sub-sect. 3, but may comprise much more. In order to effect a realisation of the property in question an indemnity policy was essential and that could not be effected without the aid of the bankrupt.

A writer over 100 years since thus expresses himself: "All the statutes concerning bankrupts are to be construed according to their real intention and together, so as to answer the great general end of the legislature as making one system of law and equity for the relief of creditors; and if any construction can be more beneficial for creditors the Court admits that construction." That construction ought still to be applied if not inconsistent with the language of the legislature, and it is to be remembered that what is beneficial to creditors is equally so to the bankrupt.

The objects of the bankruptcy statutes are, first, to take possession of the bankrupt's property and apply it to the discharge of his liabilities; and, secondly, to effect his discharge from all his liabilities and send him forth a free man if he complies with the

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provisions of the statutes. To effect these objects a speedy and beneficial realization is necessary. The surplus, if any, belongs to him.

My Lords, I am of opinion that the bankrupt failed in the duty imposed on him by the statute in this, that he did not aid to the utmost of his power in the realisation of his property. That wilful failure was fit to be considered and should have been dealt with by the registrar on the application by the bankrupt for his discharge. The difficulties supposed to arise from so deciding are more imaginary than real. The requisition of the trustee to do any particular act must be a reasonable requisition. If the act to be done cannot be reasonably required the Court will not assist the trustee; and on the other hand if the bankrupt can shew fair and reasonable ground for his refusal the Court will neither make an order to compel obedience nor treat his refusal as a contempt.

The 28th section has here an important bearing on the question. It is divisible into two parts. By the first the Court is to take into consideration the report of the official receiver as to the bankrupt's conduct and affairs, and may in its judicial discretion grant or refuse an absolute order of discharge or make it subject to certain conditions. The second part seems to take away its discretion or limit it in the case of certain specified offences of which the complaint against the bankrupt in this case does not form one.

My Lords, on the whole I have come to the conclusion that the order of the Court was erroneous. I have come to that conclusion with doubt and hesitation in consequence of the judgment of the Lord Chancellor and the reasons which he has given.

LORD MACNAGHTEN:—

My Lords, I agree with the majority of the Court of Appeal.

The bankrupt was required to submit to a medical examination in order that a policy might be effected on his life. The proposed policy would undoubtedly have enhanced the value of the bankrupt's property available for distribution among his creditors. The bankrupt refused to submit to the examination without suggesting any ground for his refusal.

The question is, Was such refusal conduct which ought to have been taken into consideration when the bankrupt applied for his order of discharge? That depends on sects. 24 and 28 of the Act of 1883. The case does not fall within any of the cases specified in sect. 28. The appellants are therefore driven to rely on sect. 24. It was urged that the bankrupt has not aided to the utmost of his power, as he was bound to do by sub-sect. 3, in the realisation of his property. The answer is that the proposed policy, though it would have formed a desirable adjunct to his property and would have enhanced its value, was not and never could have been in any sense his property.

Then it was said that the bankrupt has not complied with sub-sect. 2. He was bound to do all such acts and things in relation to his property as might be reasonably required by the official receiver. The same answer I think applies. In a sense the act required of him had a relation to his property, but it was not I think an act of the class to which the sub-section applies.

It may or may not be a right thing that a bankrupt should be compelled to aid his creditors in effecting an insurance on his life when there can be no reasonable objection on his part to a medical examination. That is a matter for the legislature to determine. However desirable the object to be attained may seem to be, the language of the present Bankruptcy Act ought not, I think, to be strained to bring within it cases which are not within the fair meaning of the words used.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals 9th August 1888.

Solicitor for appellant: *Solicitor, Board of Trade.*

[HOUSE OF LORDS.]

H. L. (E.) 1888 Aug. 9.

HOSKING AND OTHERS . . . . . APPELLANTS;

AND

SMITH AND OTHERS . . . . . RESPONDENTS.

Building Society—Mortgage—Statutory Receipt—Successive Incumbrancers—Priority—Tacking—Right to call for Legal Estate—"Person for the time being entitled to the equity of redemption"—Building Societies Act 1836 (6 *&* 7 *Will.* 4 *c.* 32) *s.* 5.

H. mortgaged leaseholds to building societies established under 6 & 7 Will. 4 c. 32, and executed a second mortgage to the respondents. *H.* afterwards borrowed a sum from the appellants, part of the loan being applied in paying off the building societies, and the balance being paid directly to *H.*, who executed a mortgage to the appellants to secure the loan. Upon being so paid off the building societies indorsed on their respective mortgages receipts to the mortgagor in accordance with 6 & 7 Will. 4 c. 32 s. 5, and delivered the indorsed deeds with the title deeds to the appellants. Neither the building societies nor the appellants had any notice of the respondents' mortgage. The respondents having brought an action against the appellants for foreclosure and sale:—

Held, reversing the decision of the Court of Appeal, that the appellants' mortgage had priority over the respondents' mortgage, not only in respect of the moneys applied in paying off the building societies, but also in respect of the balance of the loan paid directly to *H.*

The decisions of Lord Cairns L.C. in *Pease* v. *Jackson* (Law Rep. 3 Ch. 576) and of the Court of Appeal in *Robinson* v. *Trevor* (12 Q. B. D. 423) overruled upon this point.

APPEAL from a decision of the Court of Appeal.

Harris mortgaged leasehold property to benefit building societies established under 6 & 7 Will. 4 c. 32. In 1880 he executed a second mortgage of the property to the respondents. In 1883 the appellants lent Harris £6000, £2000 odd being employed in paying off the building societies and the balance being paid to Harris. Upon being so paid off the building societies indorsed on their respective mortgages receipts to the mortgagor in accordance with 6 & 7 Will. 4 c. 32 s. 5, and delivered the indorsed deeds with the title deeds of the mortgaged property to the appellants. Harris at the same time executed a mortgage of the property to the appellants to secure the £6000. Neither the building societies thus paid off nor the

appellants had any notice of the mortgage to the respondents. The respondents afterwards brought an action against the appellants for foreclosure and sale, the only question raised being whether the respondents' mortgage had priority over the balance of the £6000 which was paid directly to Harris, it being admitted by the respondents' pleadings that they had no priority in respect of the £2000 odd applied in paying off the building societies. The Vice-Chancellor of the County Palatine gave judgment for the appellants upon a point not material to this report. The Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) reversed this decision, and gave judgment for the respondents upon the question of priority, upon the ground that the decision of Lord Cairns L.C. in *Pease* v. *Jackson* (1), followed in *Robinson* v. *Trevor* (2), was binding.

July 3. *R. Neville* Q.C. and *P. O. Lawrence* for the appellants:—

The appellants' mortgage is entitled to priority over the respondents' mortgage not merely in respect of the £2000 odd employed in paying off the building societies, but also in respect of the balance of the £6000 paid directly to Harris. The Building Societies Act 1836 (6 & 7 Will. 4 c. 32) s. 5 vests the legal estate in the persons who have the best right to call for it —that is in the appellants. The only other reasonable construction is that it vests the legal estate in the mortgagor. In either construction the appellants have the priority. The decision of Lord Cairns L.C. in *Pease* v. *Jackson* (1) followed by the Court of Appeal in *Robinson* v. *Trevor* (2) was wrong as to this point. The observations of Jessel M.R. in *Fourth City Mutual Benefit Building Society* v. *Williams*, and *Marson* v. *Cox* (3) are sound. See also *Carlisle Banking Company* v. *Thompson* (4) per North, J.

French Q.C. and *V. Somers Browne* (*J. D. Crawford* with them) for the respondents:—

The decision of the Court of Appeal was right. At the time when the balances, amounting to £2285 or thereabouts, due to

(1) Law Rep. 3 Ch. 576.
(2) 12 Q. B. D. 423.
(3) 14 Ch. D. 140, 150, 151.
(4) 28 Ch. D. 398.

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the building societies, were paid off, the respondents had the first equity in point of time to have vested in them the estate of the mortgagees in the mortgaged properties, and the right of the respondents has only been displaced, if at all, by the better equity of the appellants in respect of so much of the amount due to them as was applied in paying off the first mortgagees. The parties paying off the first mortgagees elected not to keep alive or transfer the first mortgage debts, but to vacate and determine them, and when the debts were vacated the estate in the mortgaged properties vested in the persons who at the date of such payment off were entitled to the equity of redemption in the property mortgaged for the estates or interests for which such persons were respectively entitled to have the mortgaged estates vested in them. The appellants have therefore no right to tack to their claims, as such incumbrancers, any charge they may have for so much of the sum of £6000 advanced by the appellants as was in excess of the amount applied in paying off the balances due to the original first mortgagees.

The decision in *Pease* v. *Jackson* (1) has been followed in every instance except in the one case decided by Jessel M.R. See also *Sangster* v. *Cochrane* (2) and *Prosser* v. *Rice* (3). The words in 6 & 7 Will. 4 c. 32 s. 5 "shall be sufficient to vacate the same" mean "vacate the mortgage debt," and not merely the mortgage.

Neville Q.C. in reply cited *Willoughby* v. *Willoughby* (4).

THE HOUSE took time for consideration.

Aug. 9. LORD HALSBURY L.C.:—

My Lords, at a very early period of the argument it became apparent that the decision of the Vice-Chancellor of the County Palatine could not be supported. His Honour took a view of the facts which rendered any consideration of the law unnecessary. Neither the Court of Appeal nor any of your Lordships, I believe, have any doubt upon the facts; and it is necessary therefore to

(1) Law Rep. 3 Ch. 576.
(2) 28 Ch. D. 298.
(3) 28 Beav. 68.
(4) 1 T. R. 763.

consider the law as applicable to the facts, which I shall assume to be as found by the Court of Appeal.

The Court of Appeal considered themselves bound by the authority of the case of *Pease* v. *Jackson* (1). I have very little doubt that if that case had not stood in the way the decision would have been the other way.

It was not denied in the argument that if the transaction in question had assumed the ordinary form apart from the provisions of the 6 & 7 Will. 4 c. 32, the appellants would have been entitled to priority in respect of all their advances. Apart from the consideration of authority I cannot myself entertain a doubt that all that statute intended to do was to get rid of conveyancing formalities and to make the receipt given under the statute to operate as though it were a conveyance. The framers of the statute in giving an effect to a receipt, which the document itself does not purport to operate, had to consider what words would sufficiently indicate that what was meant was simply conveyancing and not alteration of the law; and accordingly they made the receipt vest the legal estate in "the person or persons for the time being entitled to the equity of redemption." Doubtless in most cases this would be clear enough, but where a conflict arises I cannot doubt that the statute must have meant that the estate should vest in the person who has the best right to call for it. I believe the true solution of the concluding words in Lord Cairns' judgment in *Pease* v. *Jackson* is, that it was some trifling sum, the consideration of which was quite outside the questions really argued before him, and which he summarily disposed of without meaning to lay down any principle at all. Sir George Jessel, who was counsel in the case, protested that the question was never argued. At all events the universal consent of judicial opinion has, I believe, ever since that time refused to acquiesce in the soundness of that judgment, if it can be called a judgment, though bowing to the authority of the Court that decided it. Your Lordships, however, are free to pronounce a decision upon it; and as it does not rest upon anything but the words so uttered at the end of a judgment dealing with the other and more important part of the argument, I think

(1) Law Rep. 3 Ch. 576.

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your Lordships will do well to consider rather the current of judicial authority than the single opinion so given; and to overrule the judgment so far as that part of the judgment is concerned.

I move your Lordships, therefore, that the appeal be allowed.

LORD WATSON:—

My Lords, John Parsons Harris was owner of the equity of redemption in certain leasehold property, which he had mortgaged, in separate portions, to three benefit building societies constituted under 6 & 7 Will. 4 c. 32. On the 28th of December 1880 he executed a second mortgage of the entire property in favour of the respondents, Edward Payson Smith and Frederick Smith, his estate agents, to cover a balance of £600 which he then owed them, and also "any further indebtedness by him to them."

In February 1883 Harris made proposals to the appellants for a loan of £6000 upon the security of certain hereditaments, including the leasehold property, which they agreed to accept upon condition that the mortgages of the three building societies should be discharged. The transaction was carried out, in manner following, upon the 1st of March 1883. The appellants, on behalf of Harris, paid to these societies the sums then due to them, whereupon they each indorsed upon their respective mortgages receipts to the mortgagor, in accordance with the provisions of 6 & 7 Will. 4 c. 32 s. 5, and delivered the indorsed deeds, along with the titles of the mortgaged property, to the appellants. The balance of the £6000 was paid by the appellants to Harris, who gave them an indenture of mortgage, by which he conveyed to them the leasehold property and other subjects, to secure repayment of the sum of £6000, with interest, as therein covenanted. Neither the societies whose mortgages were paid off, nor the appellants, had at that time any notice of the respondents' mortgage. The first intimation which the appellants had of its existence was conveyed to them in a letter from the respondents bearing date the 22nd of May 1885.

This appeal is taken in a suit brought by the respondents for foreclosure and sale, in which they claim to have it declared

that their debt is in priority to that of the appellants, except in so far as the latter was incurred in paying off the first mortgages affecting the leasehold property. No question is raised on the pleadings, except as to the priority of the appellants' mortgage, in respect of the balance of the loan, which was paid directly to Harris. Upon the evidence laid before him at the trial, the Vice-Chancellor of the County Palatine gave judgment for the appellants, without entering into the merits of the case, upon the ground that the appellants' mortgage was void, by reason of material alterations having been made upon it after its execution. The Court of Appeal reversed his decision, being satisfied that the evidence, the credibility of which is not impeached, does not support the inferences derived from it by his Honour. The view of the Vice-Chancellor was submitted for our acceptance by the respondents' counsel; but your Lordships were very clearly of opinion that the Court of Appeal was right, and I need say no more upon that point. It therefore became necessary for the Court of Appeal to deal with the question of priority, which they decided in favour of the respondents. Their Lordships conceived that they were bound to follow the case of *Pease* v. *Jackson* (1), which was decided by Earl Cairns, sitting as Lord Chancellor, in the year 1868.

The circumstances which gave rise to controversy in *Pease* v. *Jackson* (1) were very similar to those which occur in the present case. The third mortgagee, who had no notice of the second charge, advanced £230 5*s.* 4*d.*, of which £223 1*s.* 5*d.* was applied in payment of the first mortgage, held by a building society, who, on receiving the money, indorsed a receipt on their mortgage, and handed it to him, along with the titles of the property. Lord Romilly M.R. held that the original mortgage was vacated by the 5th section of the Building Societies Act of 1836; and that the third charge in point of date was an entirely new mortgage, which must be postponed to the second of the original securities. The Lord Chancellor reversed his judgment, and preferred the last mortgagee to the extent of £223 1*s.* 5*d.*, but postponed the balance, which only amounted to £7 3*s.*, to the incumbrance of the second mortgagee. The case turned, as the

(1) Law Rep. 3 Ch. 576.

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present does, upon the construction of the 5th section of 6 & 7 Will. 4 c. 32, which makes it lawful for the trustees of a building society to indorse upon their mortgage a receipt for the moneys thereby secured, "which shall be sufficient to vacate the same, and vest the estate of and in the property comprised in such security, in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any reconveyance of the property so mortgaged."

Upon the general import of the clause these observations occur to me. In the first place, reading the clause along with the other provisions of the Act, and the sections of 10 Geo. 4 c. 56 and 4 & 5 Will. 4 c. 40 which it incorporates, I think it is clear that the main purpose of the legislature in enacting it was to reduce expense in conducting the business of building societies, which, as the preamble bears, had been established principally amongst the industrious classes. In the second place, I can discover in its language no indications of an intention on the part of the legislature to alter the existing law, or to affect the rights and interests inter se of mortgagors and mortgagees. It appears to me that the sole object of the legislature was to provide a cheap statutory substitute for a reconveyance of the legal estate, and that the indorsed receipt was meant to operate in favour of the person or persons who might at its date have the best right to a conveyance of the property mortgaged.

There is, no doubt, some obscurity in the words "person or persons for the time being entitled to the equity of redemption." Earl Cairns points out, in *Pease* v. *Jackson* (1), the two constructions of which he thought they were susceptible. "One construction might be, that if the mortgagor comes to the building society and pays off the mortgage money, and a receipt is indorsed stating that he, in one sense certainly the owner of the equity of redemption, has paid off the mortgage money, thereupon, without it being necessary for the trustees to give him on that payment a reconveyance of the property mortgaged, the property shall vest in him. Another construction might be this,

(1) Law Rep. 3 Ch. 582.

that no matter who pays off the mortgage money, the receipt indorsed is to operate so that the legal estate in the mortgaged premises is to go at large to whichever of all the persons entitled in any shape or form to the equity of redemption has the best title to call for the legal estate, a disposition which very often could not be exactly determined except through the medium of a Chancery suit. But one or other of these constructions appears to me clearly to be the right one, for I think certainly it cannot be the right construction to hold that if, as in this case, the mortgagor pays off the mortgage money, and the receipt is indorsed, the legal estate is ipso facto to vest in the next equitable incumbrancer in point of time, without regard to the question whether he has the best right to call for the legal estate."

I should not have thought it necessary to quote that passage in extenso had it not been argued for the respondents that the construction which the Lord Chancellor summarily rejects is the right one, and that the effect of the indorsements made by the three building societies was to vest the legal estate in them as incumbrancers next in point of time. The result of that argument, if well founded, must be that the respondents' security is preferable to the whole of the appellants' mortgage debt, whereas they have admitted, in their pleadings, that it is postponed to that part of the debt which went to clear off prior incumbrances. Probably the admission, if erroneously given, ought not to prejudice the respondents in pleading the true construction of sect. 5 against the balance of the appellants' debt; but it is sufficient to say that the argument appears to me to be unfounded, and to be completely met by the reasoning of Earl Cairns. Of the two possible constructions propounded by the noble and learned Lord, I prefer the second. I think the legislature, by the expression "person or persons entitled to the equity of redemption," meant to indicate that there might be persons other than the mortgagor who would be so entitled, and that its true interpretation must be reached, in cases like the present, by holding that the expression refers to the person or persons who, at the time of the indorsement, have the better equity to call for the legal estate. The appellants are admittedly in that position, so far as they

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stand in the place of the three societies who were originally first mortgagees; but *Pease* v. *Jackson* (1) is a direct decision to the effect that, although the legal estate is now vested in them in respect of that part of their mortgage debt, they have no priority in respect of the remainder.

All that Earl Cairns says with regard to the small balance of £7 3*s.* is "the defendants will, however, only be entitled to be redeemed for the amount advanced by them to the Middlesborough Society (i.e. to the original mortgagees): as to any charge beyond that, the Leeds Society will be incumbrancers puisne to the plaintiffs, and there will be an ultimate decree of foreclosure against them for that amount." For that conclusion the noble and learned Lord assigns no reasons; and I am disposed to think that he had not considered the point. In *Marson* v. *Cox* (2) the late Master of the Rolls, who was one of the counsel engaged in *Pease* v. *Jackson* (1), strongly disapproved of that part of the decision, and stated expressly that the point was not argued. The decision in *Pease* v. *Jackson* (1) has nevertheless been followed by the Court of Appeal in *Robinson* v. *Trevor* (3) and in the present case; but none of the learned judges who constituted the Court on these occasions have expressed their approval of it; whilst Lindley L.J. in this case referred to the opinion of Sir George Jessel in *Marson* v. *Cox* (2) as one "which, in point of reason, I am bound to say would commend itself to my mind."

I am unable to agree with the decision in *Pease* v. *Jackson* (1) in so far as it relates to the balance of the moneys advanced against the new mortgage which was not expended in paying off the original incumbrances, because it appears to me to be at variance with the true intendment of the 5th section of the Act of William IV., and the ordinary principles which govern the priority of mortgage debts. I assume that the appellants were entitled to the equity of redemption within the meaning of that section, solely in respect of that portion of their loan of £6000 which was paid to the three building societies, and not in respect of the balance of the loan. But, seeing that the statute vests

(1) Law Rep. 3 Ch. 576. (2) 14 Ch. D. 151.
(3) 12 Q. B. D. 423.

the legal estate in them, in respect of that portion, I think they are practically in the same position as if they held two mortgages, both dated the 1st of March 1883, one for the amount paid to the three societies conveying to them the legal estate, and another for the balance but without such conveyance. In that case it does not seem to admit of doubt that their acquisition of the legal estate under the one mortgage would enure to the benefit of the other so as to give it priority to the respondents' security, although the latter is earlier in date. In my opinion sect. 5 simply dispenses with the necessity for a formal deed, and vests the legal estate in the person entitled to it as fully and to the same effect as if he had actually obtained a conveyance. It does not prescribe the consequences which must attend the equivalent which it provides; it leaves them to be ascertained according to the existing law, and they must therefore be the same as if a conveyance had been executed.

I am accordingly of opinion that the order appealed from must be altered in so far as it relates to the sums which were paid directly by the appellants to their mortgagor.

LORD FITZGERALD :—

My Lords, I concur with my noble and learned friends in disapproving of so much of the decision of Lord Cairns in *Pease* v. *Jackson* as is to be found on page 584 of Law Reports 3 Chancery Appeals. Subsequent authorities do little more than follow that decision so far. It has been disapproved of by Sir George Jessel, in the case reported in 14 Chancery Division; and by Lindley L.J. in the passage quoted from the reasons of the Court of Appeal in the present case. It is to be observed, too, that in *Robinson* v. *Trevor* (1) the Master of the Rolls and Bowen L.J. accept the conclusion arrived at by Baggallay L.J., only on the ground that they feel bound by *Pease* v. *Jackson* (2). That decision is now so far overruled.

I am of opinion, with my noble and learned friends, that the appellants, having paid off the first mortgages and got from the first mortgagees possession of the muniments of title and acquired

(1) 12 Q. B. D. 435. (2) Law Rep. 3 Ch. 576.

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the legal estate, are for all lawful purposes entitled to the benefit of that legal estate as against the respondents.

Order appealed from reversed; the respondents Smith to pay to the appellants their costs in the Court of Appeal and in this House; cause remitted to the Chancery of the County Palatine.

Lords' Journals 9th August 1888.

Solicitors for appellants: *H. B. Priest for Edgar Hosking, Liverpool.*

Solicitors for respondents: *Pritchard & Co. for Crouther & Miller, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.) 1888 *Aug.* 9.

THE NORTH AND SOUTH WESTERN JUNCTION RAILWAY COMPANY . . } APPELLANTS;

AND

THE ASSESSMENT COMMITTEE OF THE BRENTFORD UNION AND THE OVERSEERS OF THE POOR FOR THE PARISH OF ACTON . . . . . } RESPONDENTS.

Poor Rate—Rateable Value—Assessment of Railway Line—Line leased by Railway Company, Mode of assessing—6 & 7 Will. 4 *c.* 96 *s.* 1.

The special case stated by the arbitrator (18 Q. B. D. 740) remitted to him to find upon the facts the proper value of the tenements, no question of law for the decision of a Court being raised by the case in its present shape.

APPEAL from a decision of the Court of Appeal.

As will be seen from the judgments in this House, the order of the Court of Appeal was neither affirmed nor reversed, the case being remitted to the arbitrator. It is therefore sufficient to refer to the report of the decision of the Court of Appeal, where the special case and the contentions on each side are fully set forth (1).

(1) 18 Q. B. D. 740.

June 28, 29. *F. M. White* Q.C. and *Tyrrell T. Paine* (Sir *E. Clarke* S.G. with them) for the appellants.

Sir *R. Webster* A.G. and *McIntyre* Q.C. (*Cyril Dodd* with them) for the respondents.

White Q.C. in reply.

The House took time for consideration.

Aug. 9. LORD HALSBURY L.C.:—

My Lords, I regret to say that I do not think your Lordships are in a position to determine finally the rights of these parties. The problem propounded by the statute is plain enough in its form; it is simply to ascertain what rent a tenant from year to year would give for the occupation of the tenements, subject to certain deductions. The Courts have from time to time given decisions as to what are and what are not proper considerations in arriving at a conclusion on that subject when the facts are found before them. But the case as stated in each of the alternative propositions suggests to your Lordships for decision questions of fact, and even suggests the question which of two alternative methods is the best for arriving at the conclusion of fact. My Lords, no Court has ever given directions in such a case. As the Master of the Rolls said, when the process by which the conclusion has been arrived at has been set forth the Courts have decided whether or no the process so adopted was in accordance with or against the provisions of the statute. I asked the very learned counsel who argued the question whether he could point to a single instance where a Court had given directions as to the preferable course when it was admitted that neither course was in itself contrary to law.

Now in the case before your Lordships, I am not prepared to say that, subject to one question which I will refer to in a moment, either of the courses suggested, if the facts were found which would render the calculation accurate, would be contrary to the statute. I think it would be impossible to say that either of the modes of calculation is obligatory. The thing is to be valued as it

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is, for the purpose for which it is used, and its value is to be ascertained upon the principle which is enacted by the statute.

One topic which I said I would deal with separately, and which I will describe as the black-mailing contract, I think ought to be dismissed from any such consideration; but with that exception the questions in debate are questions which if not actually themselves questions of fact are questions into which fact enters so largely that they are questions for the arbitrator himself to decide. He must find what in his judgment the value is. All he can remit to any Court to assist him is a question of law, and he must in that case affirmatively find the facts upon which the question of law depends.

I am therefore of opinion, my Lords, that your Lordships should avoid establishing a precedent which has never, I believe, hitherto been adopted, namely of giving directions to the arbitrator how he should arrive at the fact. I think that this case should be remitted to the arbitrator for him to find what is, in the words of the statute, the proper value of the tenements in question; and if there is any question of law which he desires to reserve, that question can be reserved; but in order to reserve it effectually and properly he must affirmatively, and not in the alternative, find the facts upon which that question of law depends.

I therefore move your Lordships that this question be remitted to the arbitrator.

LORD WATSON:—

My Lords, there are principles of valuation which depend on purely legal considerations, and any misapplication of these is open to correction by the Courts. But there are also certain so-called principles of valuation, which are simply formulæ for arriving at the solution of questions of fact, which have commended themselves to valuators of experience. There may be several alternative formulæ of that kind, all of them capable of leading to a just and reasonable conclusion. It is for the arbitrator, who is constituted the judge of the facts, to determine for himself which rule of that kind he will accept for his guidance.

I agree with the Lord Chancellor in thinking that the case submitted to the House does not in its present shape raise any

question of law fitted for our decision; and I agree in the motion proposed to the effect that the case be remitted.

LORD FITZGERALD:—

My Lords, I am of the same opinion.

Special Case remitted to the arbitrator for him to find what is, in the words of the statute 6 & 7 *Will.* 4 *c.* 96, *the proper value of the appellants' railway, land, station, buildings, railway appurtenances, and coalyard, the subject-matter of this appeal, and that upon his finding the case be brought up for further consideration.*

Lords' Journals 9th August 1888.

Solicitors for appellants: *Paine, Son & Pollock.*

Solicitors for respondents: *Wright & Pilley for Ruston, Clerk & Ruston.*

[HOUSE OF LORDS.]

THE MERSEY DOCKS AND HARBOUR BOARD . . . . . } APPELLANTS;

AND

HENDERSON BROTHERS . . . . . RESPONDENTS.

Ship—Mersey Dock Acts Consolidation Act 1858 (21 & 22 *Vict. c. xcii.*) *s.* 230—*Dock Tonnage Rates—"Trading inwards" and "Trading outwards"—"Arriving in ballast"—Arrival and Departure constituting one Voyage.*

Vessels took in part of their cargo at Glasgow, sailed to Liverpool, entered the appellants' docks and there completed their loading but discharged no cargo: they then proceeded to a port in India, there discharged and loaded a complete cargo, thence sailed to Liverpool, entered the appellants' docks and there discharged the whole or part of their cargo, and then returned with the remainder of their cargo or in ballast to Glasgow:—

Held, reversing the decision of the Court of Appeal (19 Q. B. D. 123), that under sect. 230 of the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.) such vessels using the appellants' docks as aforesaid on their way to India were liable to dock tonnage rates, not (as the

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Court of Appeal had held) as vessels "trading inwards" from Glasgow, but as vessels "trading outwards" to India; and that such vessels using the docks as aforesaid on their return voyage from India were liable to rates as vessels "trading inwards" from India.

APPEAL from a decision of the Court of Appeal (1).

The appellants were public trustees incorporated by the Mersey Dock and Harbour Act 1857 (20 & 21 Vict. c. clxii.) and under that Act and other Acts were entitled to receive certain rates and dues.

Sect. 230 of the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.) is as follows:—

"All vessels entering into or leaving the docks shall be liable, according to the tonnage burden thereof, to pay to the board the rates hereinafter called dock tonnage rates mentioned in Schedule (B.) to this Act annexed, according to the several and respective classes of voyages described in such schedule; that is to say, to or from the port of Liverpool from or to any parts or places in such schedule mentioned, and such rates shall be paid to the board by the masters or owners of such vessels, and shall be charged as follows:

"Vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool:

"Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool, or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates:

"Vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear out or depart:

"One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast,

(1) 19 Q. B. D. 123.

and without regard to any intermediate ports between which she may have traded whilst absent from Liverpool, but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded: Vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards, and having paid the rates payable on such trading outwards, shall afterwards, on trading inwards, be liable to the rates payable on vessels trading inwards."

The rates mentioned in Schedule B. varied according to the distance of the place to or from which the vessel traded. Vessels trading coastwise between Liverpool and Scotland were charged at the rate of 4½*d.* per ton. Vessels trading between India and Liverpool at the rate of 1*s.* 5*d.* per ton.

The respondents were owners of vessels which traded between Liverpool and Glasgow and foreign ports as follows:—

The vessels took in part of their cargo at Glasgow, proceeded to Liverpool, entered the docks and there completed their loading, but discharged no cargo, and thence proceeded to a port in India where they discharged. At that port they loaded a full cargo and sometimes came back to Liverpool, and having there discharged part or the whole of the cargo proceeded with the rest of the cargo or in ballast to Glasgow, or sometimes came back direct to Glasgow.

The appellants had charged and claimed to charge the dock tonnage rates thus: in respect of the arrival at and departure from the docks on their way from Glasgow to India, as on vessels trading outwards to India, treating the arrival and departure as one voyage, viz. at the rate of 1*s.* 5*d.* per ton: in respect of the arrival at and departure from the docks on their way from India to Glasgow, as on vessels trading inwards from India, treating the arrival and departure as one voyage, viz. at the rate of 1*s.* 5*d.* per ton.

The respondents brought an action against the appellants to recover what they alleged were overcharges, and claimed in respect of the voyage from Glasgow to India that no rates were payable, because such vessels were not vessels trading inwards

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nor vessels arriving in ballast and trading outwards, and that the case of vessels entering the docks not in ballast but with cargo and trading outwards was not provided for by sect. 320: or, alternatively, that, if the case was provided for the vessels must be considered as vessels trading inwards and were chargeable as on a coastwise voyage, as distinguished from a foreign voyage, viz. at the rate of $4\frac{1}{2}d.$ per ton. They also contended that the arrival from India at Liverpool and the departure from Liverpool to India constituted one voyage within the meaning of sect. 230, in respect of which only one rate of 1*s.* 5*d.* per ton was payable.

Mathew J., by whom the action was tried, held that the dues which the defendants were entitled to charge were the coastwise dues in respect of the voyage from Liverpool to Glasgow and back, and the foreign dues in respect of the outward voyage to Bombay and back, and that the charges made were excessive and illegal; and directed judgment to be entered for the plaintiffs for the repayment of such sums as should be found to have been paid in excess, and an account to be taken.

The Court of Appeal (Bowen and Fry L.JJ., Lord Esher M.R. dissenting) ordered the judgment of Mathew J. to be varied by declaring that the defendants were entitled to charge in respect of every ship arriving from Glasgow and sailing for India as above described, the rates as on a ship trading inwards as from Glasgow; and in respect of every ship arriving from India and sailing for Glasgow as above described, the rates as on a ship trading inwards from India, and confirmed the judgment in all other respects (1).

Against this order the defendants appealed.

July 17, 19. Sir *H. James* Q.C. and *Finlay* Q.C. (*French* Q.C. and *T. F. Squarey* with them) for the appellants argued that the basis on which they had always charged the respondents' vessels was right, and for the reasons given by Lord Esher M.R. Upon the construction of the words "trading inwards" "trading outwards" and "in ballast" they referred to a series of Liverpool Dock Acts beginning with 8 Anne c. 12, and in particular to

(1) 19 Q. B. D. 123.

51 Geo. 3 c. cxliii. ss. 6, 10, 11: also to the Customs Consolidation Act 1876 (39 & 40 Vict. c. 36) ss. 50, 101, 140, 144, 145, and the Customs and Inland Revenue Act 1879 (42 & 43 Vict. c. 21) s. 9.

Sir *R. E. Webster* A.G. and *Cohen* Q.C. (*Joseph Walton* with them) for the respondents contended that the decision of the Court of Appeal was right.

Sir *H. James*, Q.C., in reply.

The House took time for consideration.

July 23. LORD HALSBURY L.C.:—

My Lords, the decision of the question before your Lordships is important, not only to the dock company and the shipowner, but to the trade of Liverpool. I do not think any one can reasonably complain that a question so important has been raised, since three different views have been entertained by the four judges before whom the question has come. It certainly was most reasonable in Messrs. Henderson to shew, if they could, that charges were being imposed upon them greater than the law allowed. It was equally reasonable in the dock company to shew, if they could, that they were acting strictly within their rights. I think there is nothing in the conduct of either of the parties to this litigation which calls for or justifies complaint.

The question turns on the true construction of the 230th section of the Act of 21 & 22 Vict. c. xcii. The respondents, who own vessels which start from Glasgow, send their vessels to Liverpool to take in goods in addition to what they have already loaded in Glasgow, and for the purpose of this loading in Liverpool they enter the appellants' docks, but unload no part of the cargo. The first question which arises is whether a vessel arriving in Liverpool under such circumstances is a vessel trading inwards. I confess even without the assistance to be derived from a class of statutes which I will mention presently, I should not be able to place upon the words the sense which the majority of the Court of Appeal have attached to them. It certainly is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts and to construe it by the

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separate meaning of each of such parts when severed. Many examples will occur to the mind where such a process would lead to absurdity; but in truth when one considers what is the matter with which the statute under construction is conversant, the phrase is, as it appears to me, free from all doubt.

The statute is imposing rates for the use of the docks, and is undoubtedly dealing with the export and import of goods. Now in this, as in most countries, export and import are regulated by law in their mode of administration. No vessel can bring cargo to this country, or take it away, or even carry it by sea from one port in this country to another, without being submitted to a whole system of supervision which has been imposed by law. The statutes which created the machinery and regulated the trade and commerce of this country in respect of export and import, are those from which the legislature would naturally adopt the phraseology when imposing dock rates in respect of trade conducted by vessels bringing goods to a port or taking goods away. I quote, for convenience, the Customs Consolidation Statute of 1876, but the nomenclature upon which I rely is to be found in Customs statutes long before 1858.

Upon a review of the statutes of which the Act of 1876 is a consolidation, it is apparent that all sea traffic is exhaustively divided into import, export, and coasting trade, and the phraseology of the Dock Act becomes perfectly intelligible. I will take only one section, though many might be quoted. That section is sect. 101 and is as follows:—"The master of every ship in which any goods are to be exported from the United Kingdom to parts beyond the seas, or his agent, shall before any goods be taken on board, except as is hereafter provided, deliver to the collector a certificate from the proper officer of the due clearance *inwards* or coastwise of such ship of her last voyage," containing certain particulars. It then provides that if the vessel shall have commenced her lading at some other port, the master must deliver to the proper officer the clearance, and enacts a penalty of £100 upon any master who shall take on board any goods unless the vessel shall have first entered *outwards*. Then there is an exception in favour of ships with what is called a "stiffening order," which appears to be an order permitting a vessel to take on board

heavy goods to steady the ship in lieu of ballast, which when necessary appears to be given without a regular entry outwards. Then there is a permission to allow a vessel to be "entered outwards" before the whole of the goods imported in such ship shall have been discharged therefrom, the complete separation of such goods from the *inward* cargo being effected to the satisfaction of the proper officer. Here we have inward clearance, inward cargo, and by the light of such a system as well as by the use of the particular words, I cannot doubt that "trading inwards" does not mean "a trading vessel going into a port," but means that not only the vessel is to be going in, but *the trading* and not the vessel is to be *inwards*, a trading inwards by way of import, as distinguished from trading outwards by way of export.

Without, therefore, the aid of the 10th section of the 51 Geo. 3 c. cxliii. I come to the conclusion that these vessels, under the circumstances stated, are not trading inwards. It will be observed that in the section I have already quoted, the vessel is described as entering *outwards*, which has already partly laden at another port, and, as the Master of the Rolls points out, these vessels, in accordance with the system described, enter outwards at Glasgow for India via Liverpool, and would not be permitted to load on board a single bale of goods unless they produced that *outward* clearance from Glasgow.

Having arrived at the conclusion that these vessels are not trading inwards at Liverpool, the next question arises whether they are vessels in ballast, and I think they are not. The statute says nothing about cargo used as ballast, or about vessels so laden as to be stiff enough to be moved, as if they were vessels in ballast.

The words are perfectly intelligible, used in their natural and proper sense, and therefore I cannot give them an artificial and non-natural sense in order to effect what I may consider a more just rule than the statute has enacted.

It is admitted by the respondents that if these vessels are not in ballast and are not trading inwards, there is, according to their construction of the statute, no provision made for them at all, a sufficiently startling supposition in respect of a practice that the evidence in this case proves to exist, and which the

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Customs statute I have quoted shews to have been known to the legislature. But the 5th and 7th sections of the 51 Geo. 3 c. cxliii. impose duties on *all* vessels coming into or going out of the docks, and the argument to shew that the legislature omitted to consider the particular case in question only arises when provisions against a vessel being called upon to pay both for going in and coming out in the prosecution of the same voyage are being considered.

I agree with Fry L.J. and Bowen L.J., though I think the argument leads to a different result from that at which the Lords Justices arrived, that "No casus omissus can be admitted where the section declares that all vessels" entering or leaving the docks are charged. I have suggested the last words instead of those actually used, since the sense requires it, and I think that is what their Lordships meant. I believe that no case can be found to authorize the construction of the majority of the Court of Appeal altering a word so as to produce a casus omissus. The statute is admittedly enumerating the classes of vessels which are to pay various rates according to circumstances enumerated in the statute, and it is part of the argument that this is being done so as to arrange for the class of rates which are to be applied to all vessels coming into or going out of the docks. Vessels trading inwards are to pay one rate; vessels trading outwards which have arrived in ballast—and now I quote the exact words of the statute—"Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool, *or trading outward*, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates; Vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear." According to the natural meaning of the language, the statute enumerates vessels arriving in ballast, but trading outwards, vessels built in Liverpool (which therefore must and can only trade outwards on their first voyage), vessels trading outwards without specifying how they got to Liverpool—

and within that class would come the vessels in question unless the judgment of the Court of Appeal is right; but that judgment turns "or" into "and," and absorbs the classes into one.

In the first place I know no authority for such a proceeding unless the context makes the necessary meaning of "or" "and," as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the same statute or the clear intention of it requires that to be done, as in the case of *Fowler* v. *Padget* (1), where the Act of Jac. 1., c. 15, made it an act of bankruptcy for a trader to leave his dwelling-house to the intent *or* whereby his creditors might be defeated or delayed. These words if construed literally would have made every trader commit an act of bankruptcy if he casually left his dwelling-house and some creditor called for payment during his absence. It may indeed be doubted whether some of the cases of turning "or" into "and" and vice versâ have not gone to the extreme limit of interpretation, but I think none of them would cover this case. Here, not only is "or" changed into "and," but the whole sentence is practically struck out, since the construction insisted on reads it thus (leaving out the words altogether): "Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards."

It may be said that the words "but trading outwards," as above given, are unnecessary also; but though I will not say that in very strict construction they would not be implied, yet they form a natural antithesis to vessels arriving in ballast and departing in ballast. If, however, I am right in saying that these vessels are neither trading inwards nor in ballast, then the change of "or" into "and," or the striking out of the whole sentence, actually produces a casus omissus which seems to me, as it did to the two Lords Justices, entirely inadmissible.

With respect to the unity of the voyage and the judgment of Mathew J., I only wish to say that in no proper technical sense are the goods from Glasgow to Liverpool carried coastwise; and

(1) 7 T. R. 509.

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that they might have been so carried is nothing to the purpose, nor if they had been would it have affected the question, since the voyage of the vessel would have been what the Master of the Rolls has described.

For these reasons I am of opinion that the appellants have charged no more than they were entitled to charge, and I move your Lordships that the order appealed from be reversed, and that the respondents do pay to the appellants the costs both here and in the courts below.

LORD FITZGERALD:—

My Lords, the plaintiffs in the action are the representatives of an extensive steamship company, proprietors of a line of steamers commonly known as "The Anchor Line." The defendants (appellants) are a body of trustees controlling under statutable powers in one public trust the port of Liverpool and the Mersey Docks. The question relates to the dock tonnage rates paid under exceptional circumstances, possibly not actually contemplated in 1858, when the Mersey Dock Acts Consolidation Act was passed.

The plaintiffs claim a return of alleged over-payments. There is no fact in dispute. The question is one of law arising wholly on the proper construction of sect. 230 of that Act, but on that question your Lordships may derive some assistance by reference to the language of some sections in the repealed Act of 1811. The code, portions of which have been amended and consolidated in the Act of 1858, extends over a period of 179 years, commencing so far back as 1709. The undisputed circumstances may be taken from the appellants' case: "The plaintiffs' steamers commence to load goods at Glasgow, where they take in a portion only of their cargo, the amount so loaded at Glasgow varying from time to time according to circumstances; never being a full cargo, but ordinarily sufficient to enable them to proceed to Liverpool without other ballast. All the goods so loaded at Glasgow are shipped under a bill of lading in which the vessel is stated to be 'lying in the port of Glasgow, and bound for 'Bombay viâ Liverpool,' and the ship is cleared from Glasgow for Bombay viâ Liverpool.' The said goods so loaded

at Glasgow are intended to be and are in fact carried to and discharged at Bombay and are not taken out of the said ship after leaving Glasgow until her arrival at Bombay. Upon leaving Glasgow the said steamer proceeds to the port of Liverpool, where she enters one of the appellants' docks. The steamer is not cleared or entered at the custom house at Liverpool as a vessel trading inwards. She does not discharge at Liverpool any of the cargo taken on board at Glasgow, nor do the appellants receive rates of any kind in respect of that cargo. In one of the appellants' docks the steamer loads for Bombay such cargo as may be ready for her, and then leaves the dock, clears at the custom house as a vessel trading outwards, and departs from Liverpool to Bombay. At Bombay she discharges the whole of the goods so carried from Glasgow and Liverpool respectively and then loads homeward cargo."

It is, however, to be borne in mind that as the plaintiffs' vessel would be under no obligation to return to Liverpool, and frequently brings her return cargo to some other port, and does not come to Liverpool, she might thus evade the Liverpool dock tonnage rates altogether, if she did not pay at Liverpool on the outward voyage.

The terms of the 230th section of the statute of 1858 and the questions for the decision of your Lordships which arise on it have been stated by the Lord Chancellor. The 11th part of the statute applies in the first instance to "dock tonnage rates," commencing in sect. 230, the rating clause, and declares that "All vessels entering into or leaving the docks shall be liable to pay dock tonnage rates;" that is to say, "to or from the port of Liverpool from or to any parts or places mentioned in the schedule, and such rates shall be paid, &c." The schedule is referred to only for the purpose of fixing the scale. The obligation is imposed in language as clear as could be used for the purpose.

There can be no doubt that the plaintiffs' vessel comes within the charge as a vessel entering into the docks, unless there is to be found in the statute some provision which makes her liable to the $4\frac{1}{2}d.$ rate as a vessel trading inwards to Liverpool, or unless the statute has omitted to provide for the exceptional circumstances.

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Sect. 230 then declares that "such rates shall be paid by the masters or owners and shall be charged as follows." It deals with first, "vessels trading inwards."

The respondents (plaintiffs) contended that their ship, which had left Glasgow with part of her cargo and cleared from Glasgow for Bombay viâ Liverpool, became on her arrival at Liverpool a vessel "trading inwards," although she carried no cargo for Liverpool, discharged no goods there, made no entry "inwards" as of a ship trading inwards, and called at the port of Liverpool solely for the purpose of taking in cargo already provided for her to be carried to Bombay, the port of her final destination. My Lords, I am of opinion that the respondents' vessel was not, under the circumstances stated, a vessel "trading inwards" within the meaning of the statute.

We have received in the course of the argument abundant assistance from references to other sections of the particular statute and also in the Customs Act. I may supply an additional example. In the Mersey Act, sect. 166, provision is made for "landing and depositing the inward cargo," and several other sections have been referred to, which clearly to my mind shew what is meant by "trading inwards," and indicate that the respondents' ship did not come within that description.

Mathew J., dealing with the contention that the plaintiffs' vessel arriving at Liverpool, with part of her cargo for Bombay on board, ought not to be considered to be a vessel "trading inwards," says: "The position seems to me altogether untenable," and disposes of the case on the basis that she was a vessel trading inwards. Fry L.J. in dealing with the same question puts it thus: "The words 'trading inwards' would, we think, most naturally, and therefore primarily, apply to the case of a vessel entering the docks for the purpose of discharging her cargo; but we think that the words may without violence describe also any vessel laden with goods in the course of trade entering the docks for the purposes of her trade, whether loading or unloading, and thus include one of the plaintiffs' vessels arriving from Glasgow; for she is a vessel on a trading voyage; she is a trader and she enters inwards."

My Lords, I am unable to follow Mathew J.; and whilst I

accept the interpretation which the Lord Justice describes as "most naturally and therefore primarily" to be adopted, I cannot accept the interpretation which he says may be "applied without violence" as descriptive of the plaintiffs' vessel. If not "violent" it would seem to be forced and contrary to the ordinary grammatical and statutable interpretation of "trading inwards."

Sect. 230 next deals with vessels "trading outwards" thus: First, "Vessels arriving in ballast, but trading outwards." It was contended for the appellants, but rather feebly, that the respondents' ship was a ship that arrived in ballast. None of the judges gave any countenance to this suggestion; and it seems to me that according to the ordinary signification of the words she could not be deemed to be a vessel "arriving at the port of Liverpool in ballast."

Secondly, "also vessels built within the port of Liverpool." The respondent's vessel was not such. Thirdly, "or trading outwards." She was a vessel trading outwards, but the respondents contend that "or" must be read "and," and the provision would run thus "and also vessels built within the port of Liverpool *and* trading outwards," so that the respondents' vessel would not come within this portion of the charging definition of the section. But the word is "or," and has a sensible meaning in its position, and why should we take the great liberty of blotting it out and substituting another word, the result of which might be to create a "casus omissus?" We ought not to create a casus omissus by interpretation save in some case of strong necessity. The respondents contended that it was necessary to take this strong step in order to prevent a contradiction with a similar passage to be found subsequently in the same section, where the word used is "and," but I have been unable to discover the contradiction or the repugnancy. The passage alluded to is at the conclusion of the section, thus: "Vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards, and having paid the rates payable on such trading outwards, shall afterwards on trading inwards be liable to the rates payable on vessels trading inwards." But in this passage the words "*and trading outwards*" are essential to provide for the eventuality and give it proper effect, and are not in

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the least in contradiction with the words "or trading outwards" or the provision in the earlier part of the section.

The respondents' vessel then not having been a vessel "trading inwards" nor "arriving in ballast," nor built in Liverpool, we should probably have been obliged to consider it a casus omissus, as to which Fry L.J. properly says, "no casus omissus can be admitted," or, I should rather observe, ought to be created. We find other words which without any strain are applicable and may have been introduced as an amendment to meet an exceptional case. If it was a casus omissus it would seem to follow that on the outward voyage from Glasgow to Bombay viâ Liverpool the respondents' vessel would not be within the charge for any dock tonnage rates at Liverpool, although she entered the docks and used them whilst taking on board a substantial portion of her cargo for her outward voyage.

The words in the earlier part of the section "or trading outwards" seem to me to meet the case that has arisen, and to be applicable. The respondents' vessel entering the docks and trading outwards was as such liable on that outward voyage to the outward dock rates charged on her.

The 230th section declares that "one arrival with one departure shall be considered as one voyage." The respondents' vessel was a vessel arriving at Liverpool though not in ballast nor trading inwards, and she departed thence to Bombay. That arrival and departure constituted one voyage, in respect of which she became liable to dock tonnage rates. She took on board at Bombay a fresh cargo and left, bound for Liverpool and Glasgow. She arrived at Liverpool, discharged part of her cargo, and departed from Liverpool for Glasgow. That arrival and departure constituted a second voyage in respect of which the respondents became equally liable to dock tonnage rates.

The Attorney-General stated that the real contest was a fight against what he called the double payment. My Lords, I am of opinion that this real question should be ruled against the respondents, and their action dismissed.

LORD MACNAGHTEN:—

My Lords, if I were compelled to determine this case solely on consideration of the arguments presented to and accepted by the

learned judges of the Court of Appeal, I should still have some difficulty in agreeing with their decision.

I cannot see any reason for substituting the word "and" for "or" in the 2nd sub-section of sect. 230 of the Act of 1858. And I am rather disposed to think that, according to the true construction of the Act, a vessel is not within the description of vessels "trading inwards" or "trading to Liverpool" unless she comes to Liverpool with cargo for the purpose of dealing with it there in the way of trade. But this question is one, I think, of some difficulty; and it may not be unimportant to observe that the Act which originally imposed tonnage dues at Liverpool (8 Anne, c. 12, s. 3) uses the expression "trading or coming into or out of the said port with any goods or merchandise," and it imposed the dues on vessels "so trading" to and from the said port.

Nor can I accept the proposition advanced by the learned counsel for the appellants, that a vessel coming to Liverpool with nothing but cargo destined for some other port, is to be deemed a vessel "arriving in ballast."

It seems to me, however, that these questions, one and all, are rather beside the point. It cannot indeed be denied, after the course which this action has taken, that there is some apparent difficulty in sect. 230. But the solution of the difficulty, if difficulty there be, is I think to be found in sub-sect 4, not in sub-sects. 1 and 2.

Apart from the rules contained in its sub-sections, sect. 230 is perfectly clear. All vessels entering into the docks, and all vessels leaving the docks, are made liable according to their tonnage to pay dock tonnage rates. The rates are specified in a schedule which classifies all possible voyages. The rates vary with the class of the voyage in which the vessel is engaged. And they are to be paid to the dock board by the master or owner of the vessel liable. Nothing more, it will be observed, could be required to complete the imposition of these rates. But the section goes on to say that such rates "shall be charged as follows," and then follow four sub-sections or rules. These rules impose no further duties. They merely explain and limit charges already imposed.

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Rule 1 provides that "vessels trading inwards" (whatever that expression means) "shall be liable to the rates payable in respect of the most distant of all the ports from which such vessels shall have traded to Liverpool." That is the whole of rule 1. Your Lordships will observe that so far there is nothing whatever to exempt a vessel trading inwards, which pays according to this rule, from the liability imposed by the earlier part of the section on vessels "leaving the docks." A vessel paying on entering the docks would, if there were nothing more, have to pay again on leaving.

Rule 2 applies the same method of reckoning voyages (1) to the case of "vessels arriving in ballast but trading outwards;" (2) to the case of "vessels built within the port of Liverpool" (in which two cases there is no "trading inwards" at all); and (3) as a general provision to the case of all vessels "trading outwards." Again it will be observed that there is nothing in rule 2 to exempt a vessel which pays according to that rule from the liability imposed by the earlier part of the section on all vessels "entering into the docks."

It was argued that the word "or" in rule 2 must be read "and." The Court of Appeal so held. One is tempted to ask Why? The change is not required by any rule of grammar, or by the sense of the particular passage, or, with all deference to the Court of Appeal, by "the general drift" of the section or "the general scheme of the enactment" on which two of the learned judges rely. The most singular thing about this controversy is that the proposed change would not make the very slightest difference in the effect of the section. Still I can hardly doubt that the words, "or trading outwards," must have been introduced purposely. They do not occur in the Act of 1811, in sect. 6, which corresponds with the first three rules of sect. 230. It is obvious that one and the same method of reckoning ought to be applied to all voyages, inwards or outwards. If the most distant port is taken as the terminus in the one case, it ought also to be taken as the terminus in the other. Probably the framers of the Consolidation Act were struck by the apparent omission in sect. 6 of the earlier Act, and inserted the words in question in rule 2 without observing that they were not

required, because a general provision to the same effect was to be found in sect. 7, which they have reproduced as rule 4.

I may pass over rule 3. It applies to the case of vessels arriving in ballast and departing in ballast—a case where there is no trading voyage at all.

Rule 4 is the most important of all the rules. It declares that "one arrival with one departure of a vessel shall be considered as one voyage, *whether such vessel shall have traded both inwards and outwards*, or arrived or departed in ballast." The place where the voyage is to be taken into consideration is Liverpool, where the rates are collected. But it will be observed that the expression "shall have traded" is not accurate as applied to a vessel in Liverpool, which has traded inwards and is about to trade outwards. The framers of the Act, treating the inward voyage and the outward voyage as one, seem to contemplate the voyage as completed. Now if a vessel coming from Glasgow to Liverpool to fill up for Bombay is a vessel which has traded inwards, we have precisely the case mentioned first in rule 4. We have a vessel at Liverpood which has traded inwards, and is about to trade outwards, and the voyage from Glasgow to Liverpool and thence to Bombay is to be considered as one voyage. To what rates, then, is such vessel liable? The rule itself answers the question in the plainest terms: "Such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded." Again we have the same expression, "shall have traded." It must have the same meaning there as it has in the earlier part of the same sentence. It must mean "has traded or is about to trade;" and I agree that the word "to" must be read "from or to." It does not mean you are to take the outward voyage only—you are to take the furthest, whether it be the inward or the outward voyage. The consequence is, that as Bombay is the more distant port from Liverpool, the vessel must pay the Indian rate. The result is precisely the same if the voyage from Glasgow to Liverpool is not a "trading inwards," though the case would not in that view fall within any of the cases specially mentioned in rule 4. The rule is clear, "one arrival with one departure of a vessel shall be considered as one voyage," and "such vessel

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shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded." Bombay would still be the most distant port within the meaning of rule 4, and so the Indian rate is payable.

I cannot agree with the majority of the Court of Appeal that "the inward rates are to be paid preferentially," in the sense that an inward rate, however small, clears the outward rate on the same voyage, however large. It is true that the rates are collected on arrival. For obvious reasons that must be the more convenient course. The practice apparently had varied before the Act of 1811, and it was settled by that Act on the ground of expediency (51 Geo. 3 c. cxliii. s. 11). But the mode of collection cannot nullify the plain directions of rule 4 as to the amount to be collected.

The result is that in my opinion the dock board are entitled to the charges which they claim to make. I think, therefore, that the appeal must be allowed.

Order appealed from reversed, and judgment entered for the appellants (defendants in the action); the respondents to pay to the appellants their costs both in this House and below. Cause remitted to the Queen's Bench Division.

Lords' Journals 23rd July 1888.

Solicitors for appellants: *Rowcliffes, Rawle, & Co.*, for *A. T. Squarey, Liverpool.*

Solicitors for respondents: *Rowcliffes, Rawle, & Co.*, for *Hill Dickinson, Lightbound, & Dickinson, Liverpool.*

[HOUSE OF LORDS.]

PAYNE AND OTHERS . . . . . APPELLANTS;

AND

ESDAILE AND ANOTHER. . . . . RESPONDENTS.

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Tithes — Non-payment of Tithes — Limitation — City of London Tithes — 37 Hen. 8 c. 12 — Tithe Prescription Act, 2 & 3 Will. 4 c. 100 s. 1 — Statute of Limitations, 3 & 4 Will. 4 c. 27 ss. 1, 2.

The statute and decree of 37 Hen. 8 c. 12 provided that the inhabitants of the city of London for the time being should yearly for ever pay their tithes in respect of their houses after certain rates. A lay impropriator of the tithes in a parish within the City having brought an action to recover from the inhabitants of certain houses within the parish tithes payable under this statute, it appeared that (so far as was known) no tithes or payments in lieu of tithes had ever been paid in respect of those houses:—

Held first, upon the authority of *Andrews* v. *Drever* (3 Cl. & F. 314) that (apart from statute) mere non-payment afforded no defence even against a lay impropriator:—

Held secondly, that the payments imposed by 37 Hen. 8 c. 12 were not a render of tithes in kind within the meaning of the Tithe Prescription Act, 2 & 3 Will. 4 c. 100 s. 1, and that that Act afforded no defence:—

Held thirdly, that the payments imposed by 37 Hen. 8 c. 12 were "annuities or periodical sums of money charged upon land" within the meaning of the Statute of Limitations, 3 & 4 Will. 4 c. 27 s. 1, and that that statute (as amended by 37 & 38 Vict. c. 57) afforded a defence to the action.

APPEAL from two orders of the Court of Appeal, made respectively on the 29th of January, 1885, and the 19th of February, 1886.

In 1880 Edward Jeffries Esdaile, as owner in fee simple of the rectory impropriate of the parish of St. Botolph without Aldgate in the city of London and as such entitled to the tithes therein, brought an action against the present appellants, as inhabitants or occupiers of certain houses situate within that part of the parish which lies within the city of London, claiming an account and payment of what was due in respect of the tithes and payments since Easter 1879, to be calculated at the rate of 2*s.* 9*d.* upon every 20*s.* and 1*s.* 4½*d.* upon every 10*s.* of the improved rents, in accordance with the 37 Hen. 8 c. 12.

E. J. Esdaile having died in 1881 the action was revived by

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making his executors and devisees, the present respondents, plaintiffs.

At the trial before Kay J. in November 1883 it was proved or admitted that E. J. Esdaile was during his life owner in fee simple of the rectory impropriate, but that (so far as could be discovered) neither he nor his predecessors in title had ever received any tithe or payment in lieu of tithe in respect of the houses.

Kay J. being of opinion that the defendants had a statutory defence under 2 & 3 Will. 4 c. 100 dismissed the action. The Court of Appeal (Baggallay, Bowen and Fry L.JJ.), being of opinion that there was no defence under that statute, by an order of the 29th of January, 1885, reversed the decision of Kay J. and remitted the action to his Lordship, who ordered an account to be taken, the tithes to be calculated at 2*s.* 9*d.* upon every 20*s.* of the rent. This order was affirmed on the 19th of February 1886 by the Court of Appeal (Cotton, Bowen and Fry L.JJ.), their Lordships being of opinion that there was no defence to the action, either by reason of non-payment, or under 3 & 4 Will. 4 c. 27.

The statute and decree of 37 Hen. 8 c. 12 after reciting (inter alia) that "of late time contention, strife and variance hath risen and grown within the city of London and the liberties of the same between the parsons, vicars and curates of the said city and the citizens and inhabitants of the same for and concerning the payment of tithes, oblations and other duties within the said city and liberties," decreed that "the citizens and inhabitants of the said city of London and liberties of the same for the time being shall yearly without fraud or covin for ever pay their tithes to the parsons, vicars and curates of the said city and their successors for the time being after" certain rates. The rest of the statute is sufficiently referred to in the arguments and judgments.

April 26, 27, May 1, 3. Sir *Horace Davey* Q.C. and Sir *Arthur Watson* Q.C. (*H. B. Burnell* with them) for the appellants:—

The houses in question are within the city of London, and the first question is whether they are or ever were liable to tithes

under the statute 37 Hen. 8 c. 12. Tithes are incorporeal hereditaments: a right to a portion of the annual produce of the land. A modus is a manner of tithing, a sort of private commutation: not an exemption, like a composition real. A composition is a mere temporary agreement between the tithe-owner and the occupier, which may be put an end to. A composition real is very different: it is a written agreement made after the beginning of the reign of Richard I., and before 13 Eliz. c. 10, whereby land was discharged from tithes in consideration of lands or other real interest, or an annual sum of money or other recompense, being given to the tithe-owner: 2 Eagle on Tithes p. 37.

At common law tithes are not payable in respect of houses, but a modus or customary pecuniary payment may be due in respect of houses: 1 Eagle on Tithes p. 421. The statute 37 Hen. 8 c. 12 recognises the fact that there were customary tithes in respect of houses in the city of London, and fixes the amounts, and that is all that it does. It does not create the liability, although the Court in *Green* v. *Piper* (1) seems to have thought it did, but in that case 31 Hen. 8 c. 13 exempting lands which passed from the greater monasteries to laymen, was not cited. The statute calls these payments tithes and treats them throughout as such, annexing to them all the incidents of tithe, as to mode of recovery and otherwise: *Whitaker* v. *Leyfield* (2); *Bramston* v. *Heron* (3); and they were so treated in *Warden, &c. of St. Paul's* v. *Kettle* (4), per Lord Eldon. And a bill lay in the Exchequer for the recovery, just as of ordinary tithes: *Langham* v. *Baker* (5). In *St. Bartholomew's Hospital* v. *Phillips* (Nov. 4, 1878, not reported) Jessel M.R., although he said a payment of 2*s.* 9*d.* in the pound was not tithe because tithe never exceeded one tenth, treated these payments as tithes. See also *Antrobus* v. *East India Company* (6). That there were customary tithes in respect of houses in the city is recognised by the legislature in other statutes, e.g., 27 Hen. 8 c. 20 s. 2, 32 Hen. 8 c. 7

(1) Cro. Eliz. 276.
(2) 1 Gwm. 261; 1 Eag. & Yo. 232.
(3) 4 Gwm. 1314.
(4) 2 Ves. & B. 1, 13.
(5) Western's Tithe Cas. 102; Gwm. 511.
(6) 13 Ves. 9; 1 Dow. 464.

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s. 6 (which also by sect. 5 recognised that lands may be discharged or not chargeable), and 2 & 3 Edw. 6 c. 13 confirming the two former Acts. *Esdaile* v. *Assessment Committee of City of London Union* (1) is not an authority against the contention that these payments are tithes: it only decides that they are not rateable to the poor-rate.

[LORD HERSCHELL referred to *Reg.* v. *Christopherson* (2).]

Whatever be the correct legal expression of this impost those who claim it cannot refuse to treat it as tithe for the purpose of evading the effect of non-payment.

There is a further question arising upon 37 Hen. 8 c. 12; viz. whether a part of a house is chargeable. The houses in question are partly in one parish and partly in another. The Act does not specifically provide for this, and it seems to be a casus omissus. There is no severance between different vicars, and there is great difficulty in seeing how the vicar of one parish can sue for part, or how two vicars can sue for the whole. Possibly this is one reason why tithes have never been paid or demanded in respect of these houses.

Secondly, the appellants have a good defence to the action either under 2 & 3 Wm. 4 c. 100 or 3 & 4 Wm. 4 c. 27. The fact that these houses never have paid tithe has to be explained and must have its due effect. When the City wall was pulled down and these houses were built by the corporation a deed of arrangement may have been (and probably was) made between the tithe-owner and the inhabitants which would merge the tithe in the rent. No doubt at common law the mere non-payment of tithes is not by itself a sufficient answer against a spiritual tithe owner, or even against a lay impropriator: *Andrews* v. *Drever* (3). Mere non-payment (independently of statute) does not afford a presumption of a lost grant; but a lost grant is a discharge, and 2 & 3 Wm. 4 c. 100 makes non-payment a good answer if a legal ground is possible. The law as to the presumption of titles to tithes being in a very unsettled state—see 1 Eagle on Tithes p. 88, and *Norbury* v. *Meade* (4)—2 & 3 Wm. 4 c. 100 was passed.

(1) 19 Q. B. D. 431.
(2) 16 Q. B. D. 7.
(3) 3 Cl. & F. 314.
(4) 3 Bligh, 211.

Before the Act a legal exemption—either that the tithes had been held by one of the greater monasteries, or that they were merged in the rent—had to be shewn in fact. The Act makes mere non-payment for the prescribed periods an absolute discharge and dispenses with the need for allegation or proof of any legal origin for the exemption. This was Lord Cottenham's opinion in *Salkeld* v. *Johnston* (1); though some of the judges who were consulted in that case (2) and in *Fellowes* v. *Clay* (3) were of a contrary opinion. The Court of Appeal in the present case have in effect overruled Lord Cottenham. The Lords Justices say that the statute has not made non-payment a discharge where a legal exemption is impossible. But there is no such case: there may be a lost Act, or a lost deed of release or arrangement between a lay owner and the occupier. Such an arrangement would be ejusdem generis with a composition and would come within the words of the statute "claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or otherwise."

It is said that 2 & 3 Will. 4 c. 100 only applies to cases where "a render of tithes in kind" is demanded, and that these are not tithes in kind but statutory payments of money. But these are tithes in kind, and the present is a suit for the recovery of tithes, and the case is within the mischief aimed at. The payment of agistment tithes, though always payable in money, is a render of tithes in kind within 2 & 3 Will. 4 c. 100: *Salkeld* v. *Johnston* (1), where the tithes in question included agistment tithes. So of fish and of manufactured articles like bricks.

Thirdly, if the appellants are not relieved from liability under 2 & 3 Wm. 4 c. 100, they are under 3 & 4 Will. 4 c. 27. By sect. 1 "rent" is to extend to "all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)," and therefore includes these payments which are "charged upon or payable out of land" within the meaning of the statute. "Payable out of" is equivalent to "payable in respect of": see 37 Hen. 8 c. 12 ss. 9, 16, 17,

(1) 1 Hare, 196; 1 Mac. & G. 242. (2) 2 C. B. 749; 2 Ex. 256.
(3) 4 Q. B. 313.

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and Tithe Commutation Act (6 & 7 Will. 4 c. 71) ss. 67, 68 and sects. 1, 3 of 1 & 2 Vict. c. 64, which recites the Tithe Commutation Act, as to the use of the words "discharged" and "charged": and *Bailey* v. *Badham* (1). The exception as to a spiritual and eleemosynary corporation sole implies that the moduses or compositions payable to others, e.g., to lay impropriators, are intended to be included. It is said that 3 & 4 Will. 4 c. 27 can only apply as between adverse tithe-owners and not between tithe-owner and tithe-payer, and that it was so decided by the Court of Exchequer in *Dean of Ely* v. *Cash* (2) and by Lord St. Leonards in *Dean of Ely* v. *Bliss* (3). But those decisions were wrong. The decision of Lord St. Leonards was criticised by Lord Selborne in *Commissioners of Church Temporalities in Ireland* v. *Grant* (4), where the House decided that sect. 2 of the Act applied as between the owner and the person liable to tithe rent-charge. The Act applies as between the owner of an annuity and the person on whose land it is charged: *James* v. *Salter* (5). Then why not between tithe-owner and tithe-payer? The words "make an entry or distress" (sects. 2, 34) clearly apply to the recovery of periodical payments. The decision in *Grant* v. *Ellis* (6), that sect. 2 does not apply to rent reserved on a demise has no application to the present case: it turned upon the word "estate" in sect. 3, a person entitled to the rent reserved by a lease having no "estate" in the rent. The respondents' arguments are inconsistent with each other. They first say that the payments claimed are not within 2 & 3 Will. 4 c. 100 because they are not tithes; and secondly, that they are not within 3 & 4 Will. 4 c. 27 because they are tithes.

Sir *Richard E. Webster* A.G. and *F. W. Maclean* Q.C. (*H. B. Howard* with them), for the respondents:—

These payments were not tithes, but arose out of disputes with the citizens of London as to what should be paid for services, oblations, and other customary payments. Since 37 Hen. 8 c. 12 they have been called tithes, but all the authorities treat them

(1) 30 Ch. D. 84.
(2) 15 M. & W. 617.
(3) 2 D. M. & G. 459.
(4) 10 App. Cas. 14.
(5) 3 Bing. N. C. 544.
(6) 9 M. & W. 113, 124.

as, in fact, not tithes in any sense, but as a statutory tax: see "The case concerning payment of Tythes in London" (1); Degge's Parsons' Counsellor and Bohun's Privilegia Londini. In *Bartholomew's Hospital* v. *Phillips* (not reported) Jessel M.R. says distinctly that they were not tithes, and *Reg.* v. *Christopherson* (2) is an authority to the same effect. Under 37 Hen. 8 c. 12 the payment is only a charge upon the occupier of the house, a personal liability in respect of his occupancy of the house (sect. 4) not of land. It is not a charge upon the land.

[LORD MACNAGHTEN referred to *Finch* v. *Squire* (3) per Sir W. Grant M.R. as to a charge on the occupier being a charge on the land.]

The only land dealt with by the statute is garden "containing half an acre or more": sects. 14, 15. The Act gives no remedy to the payee on the view that these payments are of the nature of tithe. The remedy is against the occupier, not against the land.

As to the 2 & 3 Will. 4 c. 100, if it had the effect contended for, it would repeal 37 Hen. 8 c. 12, but a special Act cannot be repealed by a general Act without express words or a manifest intention to repeal. Apart from statute mere non-payment of this statutory tax cannot per se give an exemption. And "a man cannot prescribe or allege a custom against a statute": Co. Litt. 115 a. The 2 & 3 Will. 4 c. 100 has no application to these payments; it refers only to claims for tithes, claims which can be met by a modus decimandi or a composition real, and not to claims for "personal payments to the clergy" or other money payments. The object of the Act was to give a conclusive answer to a claim for a tenth of the produce of the land and to shorten the time in cases where a modus decimandi or a composition real could be set up. The words "in cases where the render of tithes in kind shall be demanded" exclude the present case, for no render of tithes in kind could be demanded of this tax in respect of houses. *Salkeld* v. *Johnston* (4) is no authority against this contention, for there it was admitted that the claims were in respect of tithes.

(1) Calthrop, 93.
(2) 16 Q. B. D. 7.
(3) 10 Ves. 41, 44.
(4) 1 Hare, 196; 1 Mac. & G. 242.

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The statute 3 & 4 Will. 4 c. 27 applies only to questions of title, as between rival claimants of tithe, and not between tithe-owner and tithe-occupier: *Dean of Ely* v. *Cash* (1); *Dean of Ely* v. *Bliss* (2). If the legislature had intended in 3 & 4 Will. 4 c. 27 to deal with the same subject so soon after 2 & 3 Will. 4 c. 100, clear words would have been used to shew that intention. These payments are not "charged upon or payable out of land" within the meaning of 3 & 4 Will. 4 c. 27. They are a personal charge upon the occupier: not a charge upon the land.

Sir *Horace Davey* Q.C. in reply:—

This is either tithe or it is not. If it is it must fall under 2 & 3 Will. 4 c. 100. If it is not it must come within 3 & 4 Will. 4 c. 27. They are tithes not at common law but by force of statute, and being payable in the only way in which such tithes could be paid, *Salkeld* v. *Johnston* (3) is in point. At common law the only remedy for tithes was by action. By 7 & 8 Will. 3 c. 6 s. 3 a power of distress was given for the recovery of small tithes: see also 7 & 8 Will. 3 c. 34 s. 4. These tithes are a burden on the occupation of the land, and not the less so because the remedy is imperfect.

[LORD HERSCHELL referred to *Buttery* v. *Robinson* (4), where lands were devised "charged and chargeable with the payment of the yearly rent or sum of £20," and it was held that this was a charge on the land for which there was a power of distress.]

In *Esdaile* v. *Esdaile* (5) these tithes were held by Chitty J. to be incorporeal hereditaments, and therefore "land" within the Settled Land Act 1882 (45 & 46 Vict. c. 38) s. 2. These tithes have always been treated by the legislature as tithes: see the Tithes Commutation Act 1836 (6 & 7 Will. 4 c. 71) ss. 67, 68 and 1 & 2 Vict. c. 54 s. 3. They are within the words "annuities and periodical sums of money charged upon or payable out of any land" in 3 & 4 Will. 4 c. 27 s. 1. The exception—"except moduses or compositions belonging to a spiritual or eleemo-

(1) 15 M. & W. 617.
(2) 2 D. M. & G. 459.
(3) 1 Hare, 196; 1 Mac. & G. 242.
(4) 3 Bing. 392.
(5) W. N. March 8, 1886, p. 47.

synary corporation sole"—gives the key to the interpretation of the Act, and shews that such moduses and compositions would be, but for the exception, chargeable on the land. Why is not this claim a modus or a composition, or both? A modus it is, and it seems to be a composition, as it was settled by the arbitrators, who were appointed by 37 Hen. 8 c. 12 to draw up the decree. There is no sound distinction between this and an ordinary composition.

The House took time for consideration.

Aug. 10. LORD HERSCHELL:—

My Lords, this appeal arises in an action brought by the respondents to recover certain payments which they claimed to be entitled to in respect of houses occupied by the appellants in the parish of St. Botolph Without, Aldgate, in the city of London, by virtue of the statute 37 Henry 8 c. 12. In the courts below there was some controversy as to whether the houses were situate in the parish of St. Botolph, but any objection on this ground was abandoned at the bar. And it was conceded that the houses are within the city of London, and that the respondents as the occupiers of them are *primâ facie* liable under the statute. There is, however, no evidence that "tithes" (I adopt for convenience the language of the statute without assuming anything as to their real character) were ever paid in respect of these particular houses, and in the absence of any evidence it may fairly be presumed that they were not. The question then arises, and I think it is the only question to be determined on this appeal, whether the appellants have on this ground a good answer to the claim. They put their defence in three ways. They say, first, that the tithes never having been paid, the proper presumption is that there is some legal exemption; secondly, that the respondents are barred by lapse of time under the provisions of the Tithe Prescription Act (2 & 3 Will. 4 c. 100); and thirdly, that the Statute of Limitations (3 & 4 Will. 4 c. 27, as amended by the 37 & 38 Vict. c. 57), affords an answer to the claim.

I agree with the Court below that the first point is altogether

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untenable. This House in *Andrews* v. *Drever* (1) gave their sanction to the rule that mere non-payment of tithes is, even as against a lay impropriator, no evidence to defeat his title. And Lord Eldon held in the case of the *Warden and Canons of St. Paul's* v. *Kettle* (2), that in the case of a claim of this very payment under the statute of Henry VIII., "as in the instance of a claim of tithes more strictly, it is not sufficient for the defendant to say against the claim under the statute, as it would not be sufficient against the claim at common law, that the plaintiffs never had received the 2*s.* 9*d.*"

Nor do I think the second point any more tenable. The Tithe Prescription Act only applies in cases where the render of tithes in kind is demanded. And I think it is impossible to say, in any reasonable use of language, that the payments imposed by the statute of Henry VIII. are a render of tithes in kind. Upon this question also I find myself in complete agreement with the Court of Appeal.

But to my mind the question raised as to the effect of the Statute of Limitations is a much more serious one than it appeared to be to the Court below. If the payment sought to be recovered fall within the definition of "rent" contained in the 1st section of the 3 & 4 Will. 4 c. 27, it is not disputed that there is a good defence to the claim put forward in this action. That section provides that "the word 'rent' shall extend to all heriots and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." The Court of Appeal have held that the payment in question is not within this definition, because though an annuity or periodical payment it is not charged upon or payable out of land. I gather that they interpreted the words "charged upon" as applicable only to those cases in which there was some remedy against the land itself. It may be admitted that this is the most common signification of the words, and is the meaning that would be attributed to them if there were nothing in the context to lead to a different conclusion. But it

(1) 3 Cl. & F. 314. (2) 2 Ves. & B. 1.

is at least open to consideration whether they are not used in the statute in a broader sense.

It was contended on behalf of the appellants that the exception of "moduses or compositions belonging to a spiritual or eleemosynary corporation sole" points to the conclusion that the words which precede them are used in a sense which would include moduses, and that the enactment was intended to apply to moduses belonging to persons other than a spiritual or eleemosynary corporation sole. This argument was met by Cotton L.J. with the statement that he was not satisfied that a modus could not in any way be charged upon or payable out of land. Fry L.J. on the other hand, said that he was "not sure that it was not said with perfect accuracy that a modus was incapable of being charged upon land," and intimated that such was the inclination of his opinion. Your Lordships invited the learned counsel for the respondents to shew how a modus ever could be charged on or payable out of land within the meaning given to those words by the Court of Appeal. They were unable to do so, and I am satisfied that the view taken by Fry L.J. was correct. That learned judge meets the difficulty by saying that it was obvious that the word "modus" had been used in the exception in an inaccurate sense as another expression for "composition." It is difficult to imagine that such a blunder could have been made. At the time the statute was passed moduses and compositions were things perfectly familiar and in many respects essentially different. I agree with Fry L.J. that if the words "charged upon" land are open to no other construction than that which the Court of Appeal has put upon them you must resort to some such supposition as he has suggested. But if they can reasonably be so interpreted as to give effect to the plain and natural meaning of the words of the exception and make the whole enactment consistent and intelligible, I think that such a construction ought to be adopted.

Now it seems to me that the word "charge" may well be used to describe a burden imposed upon land, and if a payment has to be made in respect of land, and it can only be enjoyed subject to the liability for that payment, I cannot think that there would be any great straining of language if it were spoken of as

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charged upon the land. The payment which has to be made under the statute of Henry in respect of the occupation of a house in the city of London may, I think, accurately be described as a burden upon it. The house cannot be enjoyed except upon the terms of making that payment. Every one who takes the house does so subject to the condition that if any benefit is to be derived from it, the payment must be made. If he occupies the house himself its value is diminished by the necessity of making this payment. If he lets it to another person he receives so much less rent because of the burden attaching to the premises. I would not lay too much stress upon the language found in the statute of Henry itself, but it is not without its importance. Sect. 17 enacts that "this present order or decree shall not in anywise extend to bind or *charge* any sheds, stables &c." It must be remembered that the obligation recognised and enforced by the statute is spoken of as "tithes." And some of the legal incidents of tithes have, as we have seen, been extended to these statutory "tithes." Now there can be no doubt that at common law tithes were not charged upon the land in the sense in which those words have been interpreted by the Court of Appeal in this case. Yet we find in 32 Hen. 8 c. 7 s. 5 a provision that no person shall be compelled to yield or pay any tithes for any lands or other hereditaments which by the laws or statutes of the realm are discharged, or not "chargeable" with payment of any such tithes. The same expressions are used in 2 & 3 Edw. 6 c. 13 s. 4, and other instances might be cited. A modus is, like tithes themselves, a burden upon land, for it cannot be enjoyed in the hands of any one, except subject to the payment of the amount of the modus. When therefore we find that the legislature had, previously to the passing of 3 & 4 Will. 4 c. 27 employed the term "charge" in relation to tithes, and that there are clear indications that they were purporting to deal with moduses by the enactment we are considering, is there anything unreasonable in supposing—indeed is it not the natural inference?—that the words "charged upon land" were used in that wider sense in which the legislature when dealing with an analogous subject-matter had already employed them. Having to choose, then, between two constructions, one which involves

the rejection of an important word found in the enactment, on the assumption that it was ignorantly inserted, as synonymous with "composition," and the other, which does no real violence to the language, and involves only the assumption that the legislature used the word "charged" in a sense that it certainly bore in previous enactments, it appears to me that the sounder view is to adopt the latter construction. The question is certainly not free from difficulty, but upon the whole I have come to the conclusion that the judgment of the Court below on this point was erroneous, and that it ought to be reversed, and judgment entered for the defendants in the action, and that the respondents must pay the costs here and in the court below, and I move your Lordships accordingly.

LORD MACNAGHTEN:—

My Lords, this action was brought by Mr. Esdaile as lay impropriator of the tithes of the parish of St. Botolph Without, Aldgate, to recover from the appellants and from other persons who have not appealed tithes, or sums in lieu of tithes, alleged to be payable under the Act of 37 Hen. 8. The claim is made in respect of house property which apparently has never subjected owner or occupier to the payment in question from the date of the Act to the date of the decree under appeal.

Before your Lordships the appellants insisted on three grounds of defence. They relied on long-continued exemption, on the Tithe Prescription Act, 2 & 3 Will. 4 c. 100, and on the Statute of Limitations, 3 & 4 Will. 4 c. 27, amended by 37 & 38 Vict. c. 57.

The first two grounds of defence are, I think, obviously untenable. It is not competent for your Lordships to depart from a uniform course of authorities which has been approved and adopted in your Lordships' House (*Andrews* v. *Drever* (1)). It must be taken to be settled law that in cases outside the Tithe Prescription Act no inference adverse to the right of a lay impropriator can be drawn from mere non-payment. In this respect the lay impropriator is in as good a position as a spiritual person.

(1) 3 Cl. & F. 314.

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In certain cases the Tithe Prescription Act permits a defendant to rely on lapse of time, but only in answer to a demand for tithes in kind. Whatever may be the proper term to apply to the payment of tithe for houses in the city of London under the Act of Henry VIII., there is one thing which that payment certainly is not—it is not the render of tithe in kind.

There remains the defence under the Statute of Limitations. This defence met with no more favour from the Court of Appeal than the other defences put forward by the appellants, perhaps rather less. But it seems to me to be well founded. It depends upon the true construction of the 1st and 2nd sections of the Statute of Limitations. If the payment in question is rent within the meaning of the 1st section there is nothing, as it seems to me, in its character or nature to exclude it from the operation of the 2nd section. Sect. 1 declares that "the word 'rent' shall extend to all heriots and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." The payment claimed by the respondent is undoubtedly a periodical sum of money. The exception of a certain description of moduses or compositions shews that payments of this sort in lay hands may be within the purview of the statute. Is the payment in question charged upon land? There is no definition of the expression "charged upon land." It has, I think, at any rate in this statute, no technical meaning. A charge means something carried, a burthen or an imposition. The statute speaks of "sums of money charged upon or payable out of land." The disjunctive form of expression seems to imply that annuities or periodical sums of money may be charged upon land within the meaning of the statute, though not, strictly speaking, payable out of the land. In the present case the payment of house tithe regulated or imposed by the Act of Henry VIII. follows the land in the hands of successive occupiers or "takers" as they are called in the Act. The liability to the payment falls upon the occupier or taker for the time being by reason of his occupation. The land carries the liability as a burthen from taker to taker. Beyond all doubt that liability

subtracts something from the profitable enjoyment of the land; it must be taken into account on the occasion of a sale, a mortgage, or a lease. An intending purchaser would give so much less purchase-money; an intending mortgagee would strike the amount off the rental in calculating the value of the proposed security, and an intending lessee would offer so much less rent. It seems to me that according to the ordinary understanding of mankind that is a charge upon land which cannot be dissociated from the land and which charges the occupier in respect of the land.

Is there anything in the Act and decree of Henry VIII. or in the authorities to negative this view? Quite the contrary. In one place, sect. 17, the Act speaks of charging or binding houses, using that expression as a convertible term for charging occupiers, or takers, for their houses. It declares that the decree shall not extend to certain houses and certain halls (sect. 16); and it speaks of houses paying the tithe (sect. 9).

In the reported cases under the Act similar language is frequently found. I do not lay much stress upon such expressions in a case where the nature of a charge was not the point in question, though I do not think they are altogether to be disregarded when we find judges like Lord Eldon and Sir William Grant using them. Sir William Grant speaks of the tithe "attaching upon" a house: *Antrobus* v. *East India Company* (1). Lord Eldon speaks of houses as being "exempt," and of a house "paying" (2). These may be merely convenient and compendious expressions; still they seem to me to shew that in the minds of those who used them there was no substantial difference between the occupier paying in respect of the house and the house itself being charged with the payment.

There is, however, one case to which I will call your Lordships' attention, where the nature of house-tithe in the city of London came under consideration, and the circumstance that the inheritance would be bound or charged by the tithe formed the ground of the decision. *Bennet* v. *Trespass* (3) was a case under the Act of Henry VIII. The plaintiff claimed the statutory payment.

(1) 13 Ves. 23. (2) S. C. 1 Dow. 466.
(3) 1 Gilb. Eq. Rep. 191; 2 Gwm. 632.

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The defence was that the houses for which it was claimed had paid a less rate before the Act, and that, therefore, according to the true construction of the Act, the defendant was not bound to pay more. Price B. was in favour of the plaintiff; but the rest of the Court of Exchequer thought an issue should be directed, and their decision was sustained on appeal to this House. The Court in directing the issue, observed, "This case relates to the inheritance, and the inheritance is to be bound by our decree, and where the inheritance is charged merely by custom 'tis usual and just, if the parties desire it, to try such custom at law."

In the course of the argument one of the learned counsel for the respondent observed that no one could say that poor-rates, though payable in respect of land, were a charge upon land. I took the liberty of referring to the case of *Finch* v. *Squire* (1), where Sir William Grant does not seem to have been quite of that opinion. The question in *Finch* v. *Squire* (1) was whether money outstanding on the security of poor-rates could be validly bequeathed to a charity. The Master of the Rolls held that it could not. "The poor-rates," he said, "are made payable by those who are occupiers of lands, tenements, and hereditaments. If a man is not occupier of lands he pays nothing unless he has other property; but if he has only land he pays in respect of that . . . . They actually burthen the lands by burthening the occupier with the duty . . . . The land pays so much [? less] rent in consequence of the occupier being liable to the poor-rates. Otherwise the landlord would have more rent. So all that is paid in respect of the land is got from the land as much as rent arises out of the land itself." Whether the actual decision was right or wrong is immaterial for the present purpose. I refer to the case in order to shew that, in the opinion of a very great judge, the difference between a charge upon land and a charge upon the occupier in respect of the land, was too fine a distinction, and that a charge upon the occupier in respect of the land was in substance and in fact a burthen or charge upon the land itself.

In the result, therefore, I am of opinion that the decision of

(1) 10 Ves. 40.

the Court of Appeal ought to be reversed, and that the action ought to be dismissed with costs.

LORD FITZGERALD:—

My Lords, I have heard the judgment of the noble and learned Lord opposite (Lord Herschell), and I have had an opportunity beforehand of reading the judgment of the noble and learned Lord near me (Lord Macnaghten), and have given to it the closest consideration. So far as it relates to the 3 & 4 Will. 4 c. 27 I concur in the result which both the noble and learned Lords have arrived at and recommended to the House.

I propose to add a few words only on the nature of the plaintiffs' demand. It is not easy to define it. The statute (37 Henry 8) calls it "tithe," but it cannot be considered as "tithe" in the true and ordinary acceptation of that term. It is better to call it a statutory periodical money payment. Is it a payment charged on and payable out of land within the meaning of sect. 1 and 2 of the Statute of Limitations? The statute of Henry VIII. deals with "tithes, oblations, *and other duties*" and we have to look at the terms of the statute and of the decree to see what it really is and whether it is charged on and payable out of land.

Sect. 3, and down to and including sect. 17, of the decree deserve to be considered. Sect. 3 provides against covenous leases made with a view to reduce rent, and so as probably to defeat or lessen this particular charge. It declares that the "farmer" or tenant is to pay according to the old rent. Sect. 4 deals with the owners and inheritors occupying their own premises and makes them liable according to the rents at which they were "last letten." Sect. 5 deals with lessees who have sublet portions of the premises, and they are made answerable according to their rents, though not in occupation of the whole. Sect. 6 deals with lessees who shall take in one lease divers mansions, houses, &c., and keep a part only in their own hands—they are chargeable according to their rents, and so the decree goes on intending to fasten the charge and prevent its evasion. Let us pass on to sect. 16, which exempts the houses of noblemen and noble women, and sect. 17 provides that the decree shall not

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in any way extend *to bind any sheds, stables, cellars, &c.*, under given circumstances. Upon the whole it seems to be a statutory periodical payment, potentially charged on the land and payable sometimes by the inheritor in respect of his ownership, or by the lessee, or where he has subdivided, in respect of the occupation of his sub-tenants, or by the occupier in respect of his occupation —all referable to the land and estimated in amount by the rent actually reserved, or that ought to have been reserved.

The exempting clauses are remarkable. Sect. 16 seems to import that but for the exemption in that section, the premises referred to in it might have been "bound or charged" with this periodical payment.

I am of opinion that these periodical payments come within the 1st and 2nd sections of 3 & 4 Will. 4 c. 27, and as such are in the particular instances before the House barred by lapse of time. I am not unwilling to arrive at this conclusion, having regard to the unquestioned allegation that during the period of over three centuries which have elapsed since the statute of Henry VIII. no attempt has been made until the present action to enforce the claim now made as against the particular property in question.

Orders of the Court of Appeal reversed; Judgment to be entered for the defendants below with costs; the respondents to pay to the appellants the costs in the Court of Appeal and in this House; cause remitted to the Chancery Division.

Lords' Journals 10th August 1888.

Solicitor for appellants: *The City Solicitor.*
Solicitors for respondents: *Winter & Co.*

[HOUSE OF LORDS.]

LORD BLANTYRE . . . . . APPELLANT;

AND

BABTIE AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.) 1888 May 11.

Award—Compensation—Waterworks—Interests injuriously affected—Value of Water enhanced by Embankments—Award apparently ambiguous, explained.

The appellant granted to D. certain mills on a stream forming the outlet to two lochs nearly surrounded by his property, with his "whole rights of water and water power connected with the said mills;" "reserving" all his "rights in the lochs" and stream "except the rights therein connected with the mills." The storage capacity of the lochs had been increased by embankments made within the appellant's ground. The respondents, who were waterworks commissioners under a special Act, acquired by agreement the rights of D. in the water, and under their compulsory powers took from the appellant a small piece of ground and a wayleave for a pipe, which they inserted in the stream and diverted the waters of the lochs to supply a town. Sect. 9 of the special Act provided that a certain quantity of water sent down the stream daily should be held to be a sufficient compensation to the mill-owners and others. Sect. 10 reserved, inter alia, any rights the appellant had in Loch Humphrey. In a claim for compensation the arbitrator found the appellant entitled (1) to £50 for the land and wayleave; and (2) "In the event of it being determined that the appellant had retained any right or interest in the waters of the lochs and the streams or any of them, and that he is now entitled to compensation in respect of such right or interest, I find £3000 to be the amount to be paid" in respect of the right or interest to be acquired from the appellant "in the foresaid waters and the embankments" at the lochs, "including in the said sum of £3000 the sum of £1650 as the estimated price or value of the embankments":—

Held, reversing the decision of the Court of Session (13 Court Sess. Cas. 4th Series, 636), that the award was valid, inasmuch as the arbitrator had valued only one thing, the enhanced value of the water in the lochs, and had not valued, as a separate subject, the embankments, but had properly included in the £3000, as a factor of value, the incidental right obtained by the respondents to have the embankments left standing.

APPEAL from the Second Division of the Court of Session, Scotland (1).

The appellant, Lord Blantyre, and his ancestors, have been since 1703 the proprietors of the estate of Kilpatrick, in Dum-

(1) 13 Ct. Sess. Cas. 4th Series, 636.

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bartonshire. The boundary of the estate includes the larger portions of the two lochs—Loch Fyn and Loch Humphrey, which are connected together by a small burn. Round the lower end of Loch Humphrey and within the appellant's ground there had been erected strong embankments and sluices regulating the outflow of the water, and increasing the capacity of the lochs. The water of both lochs issues from the lower end of Loch Humphrey by an 18-inch iron pipe, and flowed thence prior to the operations of the respondents, the Dumbarton Water Commissioners, by the Loch Humphrey Burn, through land the property of the appellant, for a considerable distance, and thence along the boundaries of his estate until it joined the Cochno Burn, after which the united streams formed the Duntocher Burn, and flowed eventually into the Clyde. In 1883 the respondents obtained by Act of Parliament, among other rights, power to divert and appropriate the water of Loch Fyn and Loch Humphrey for the purpose of supplying the town of Dumbarton with water (1).

The Act incorporated the Lands Clauses (Scotland) Act, 1845, and the Waterworks Clauses Act, 1847.

(1) Sect. 6 of the Act: "The works herein referred to and authorized by the Act are (1) a reservoir, being an enlargement of the reservoir or loch known as Loch Humphrey, to be formed by an embankment to commence at a point about 23 yards north eastward from the point where the existing byewash issues from Loch Humphrey as aforesaid, and to terminate at a point about 210 yards westward from the said point of commencement," &c.; (2) a conduit or line of pipes (No. 1) commencing in the reservoir hereinbefore described, at a point at or near the gangway to the sluice used for regulating the issue of water from Loch Humphrey aforesaid and terminating in the reservoir of the water commissioners known as Garshake Reservoir."

Sect. 8: "The water commissioners may, by means of the works by this authorized, divert, &c., appropriate, &c., the waters of Loch Fyn and Loch Humphrey, and of the said stream known as the Black Burn, and all streams, springs, and water flowing into or arising within the said lochs and streams, and into or within the site of the reservoir hereinbefore described and other works authorized."

Sect. 9: "The water commissioners shall, as soon as the waterworks authorized by this Act are completed, &c., caused to be discharged from the reservoir by this Act authorized, down the stream called Loch Humphrey Burn, a regular and continuous flow of not less than 320,000 gallons in every day (Sundays excepted) of twenty-four hours . . . . the same shall be deemed to be compensation to mill-owners and other persons interested in the waters flowing down the streams called Loch Humphrey Burn and Duntocher Burn."

Sect. 10: "Nothing in this Act contained shall be held to prejudice or

On the 14th June the respondents gave the appellant statutory notice that they intended to take absolutely (1) a portion of land extending to one-sixteenth part of an acre; (2) a portion of land extending to 245 yards in length, in regard to which they desired to take a right of servitude or wayleave for a line of pipes. In his claim lodged on the 2nd of July, 1884, the appellant stated that Loch Humphrey Burn, the natural outlet of Loch Humphrey, flowed through his property for a distance of nearly two miles; that the water of the loch and burn was used for agricultural purposes, and was capable of being used for other more important purposes; that by the acquisition of the lands and wayleaves the respondents would be in a position to abstract water from Loch Humphrey and from the burn flowing therefrom, with the result that his rights and interests would be most injuriously affected; and that in respect of the land taken and for the damage to be sustained by him by or in consequence of the works of the respondents he claimed £7000.

The parties having nominated arbitrators, and they not having given any award within the statutory period, the duty of doing so fell upon the umpire, J. A. Crichton, advocate, now sheriff of Mid-Lothian. He having taken a proof and inspected the lands, pronounced his final award on the 29th of January, 1885:—

First, I find £50 to be the amount to be paid by the respondents to the appellant in respect of the land taken and the wayleave or servitude; "and in the second place, in the event of it being admitted, or judicially determined, that the said Lord Blantyre had at the date of the foresaid statutory notice retained any right or interest in the waters of Loch Fyn and Loch Humphrey and the streams called Loch Humphrey Burn and Duntocher Burn, or any of them, and that he is now entitled to compensation in respect of such right or interest, notwithstanding the provisions contained in sects. 9 and 10 of the said Act of 1883, or either of them, I hereby find and determine the sum of

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affect the rights (if any) of Lord Blantyre in the loch known as the Loch Humphrey, or to prevent him from claiming from the water commissioners compensation for any such rights which shall be injuriously affected by anything done by the water commissioners under or for the purpose of this Act."

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£3000 to be the amount to be paid" by the respondents to the appellant "for or in respect of the right or interest to be acquired" from the appellant by the respondents in the "foresaid waters, and the embankments at said Lochs Humphrey and Fyn, and the right to intercept and to appropriate the said waters, and for the damage to be sustained by him by or in consequence of the work" of the respondents, "and that over and above the said sum of £50, including in the said sum of £3000, the sum of £1650 as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn."

It appeared from documents produced before the arbitrator that William Dunn had been the proprietor of certain mills situated on the Duntocher Burn, near to mills belonging to the Lords Blantyre, and that in 1825 the then Lord Blantyre had leased the "corn and waulk mills at Duntocher," to William Dunn, "together with full power and liberty to the said William Dunn and his aforesaids to use the water of Loch Humphrey and the dams and sluices already erected thereon, and to make a cut to draw the water thereto from Loch Fyn; and also to improve the dams and sluices upon the said lochs, and for that purpose to take earth and stones from the adjoining ground belonging to Lord Blantyre." After William Dunn's death and the expiration of this lease, a memorandum of agreement, dated 1849, was entered into between the appellant and Alexander Dunn, by which the appellant stipulated to grant an absolute disposition, conveying to Dunn and his heirs and assignees the mills on the Duntocher Burn and water rights. To carry out this agreement a feu disposition was granted in 1854 by Lord Blantyre, which narrated:—"Considering that by an agreement Alexander Dunn did agree, inter alia, to grant an absolute disposition to me and my heirs of his lands of Wester Duntiglennan, &c., and also to pay the sum of £2000, and seeing that sum has been paid, and that Alexander Dunn has granted me a disposition of the lands of Wester Duntiglennan, and that he is desirous I should now grant him, instead of an absolute disposition as provided, a feu disposition of the subjects after mentioned, therefore, in implement of my part of the said agreement, I hereby sell, &c., and in feu farm dispone to and in favour of the said Alexander Dunn and his heirs and assignees, &c., all and sundry the following subjects,

which have all been disentailed." Then followed the description of the subjects, and "all and whole my whole rights of water and water power, and other rights connected with the mills hereby disponed, including all right I have to dam up and draw water from Loch Humphrey and Loch Fyn, or to form embankments or breastworks at the said lochs." The deed then provided that the bye-wash of Loch Humphrey should not be raised above a certain height; that Lord Blantyre should not divert the water from the ground surrounding Loch Humphrey and Loch Fyn; that Alexander Dunn and his aforesaids were to have the right of access to the embankment, &c., and might make repairs, and for that purpose might use material free of charge from a certain part of the estate. The deed then contained this reservation: "First. Reserving always to me and my foresaids all our rights in the foresaid lochs and burn, except our rights therein connected with the mills and with the pieces of ground and other rights above conveyed or granted, and the right of servitude in the fourth place also agreed to be granted if hereafter required as aforesaid; and particularly, without prejudice to this general reservation, our right to use the water of the said burn for all ordinary, domestic, and agricultural purposes, including the driving of agricultural machinery or the supplying of steam-engines to drive the same, any water that may be so taken for driving such machinery being returned into the burn, so as not to interfere with the right of servitude above granted."

By disposition dated the 9th of November, 1827, William Dunn obtained from Archibald Buchanan of Auchintorlie, proprietor of land surrounding Loch Humphrey, so far as not belonging to Lord Blantyre, the right to all the waters of Loch Humphrey so far as he had power to give them.

In 1885 the representatives of the Dunns conveyed to the respondents all their rights and water privileges present and future in Loch Humphrey and Loch Fyn, with the right to dam up and draw water from the lochs and streams, together also with the embankments, sluices, and other erections in so far as they had right to the same.

After the arbitrator had delivered his award the appellant raised this action for declarator that the respondents were bound

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to pay him the sum of £3050, or, in the alternative, the sum of £50. He alleged that he had opposed the bill in Parliament on the ground that the works proposed to be constructed would, if sanctioned, divert the waters of the lochs and streams from their natural and proper course (namely, through and upon his lands), and would deprive him of the use and enjoyment thereof, and that any compensation in water alone would be quite illusory. That it was in evidence before Parliament that so far from compensation water provided by sect. 9 of the Act being the only compensation to mill-owners and other persons interested "in the waters," the commissioners had bound themselves to pay the following sums of money on the passing of the Act—to Messrs. Carlile & Co., £2000; to Mr. Dunn Pattison, £2250; and to G. McIndoe, £2250. Of these Messrs. Carlile are the only persons at present possessing a mill working or capable of being worked; the others are merely, like the appellant, riparian landowners, and do not work the sluices or maintain the dams upon the lochs; that burden being laid on Messrs. Carlile.

The respondents answered, admitted that, in consideration of the conveyance of rights in the lochs and streams the sums abovementioned were paid to the parties mentioned, who held the rights previously conveyed to William and Alexander Dunn, and who are all proprietors of mills upon the stream below the appellant's land. Admitted no money compensation was paid to the appellant, his rights in the loch having been previously purchased by the parties conveying to the respondents.

The respondents averred that before promoting the bill they made careful inquiry as to the capacity and overflow of Loch Humphrey, and they discovered that they could obtain a sufficient supply for the town of Dumbarton by purchasing the rights vested in the representatives of William and Alexander Dunn, provided the necessary powers to construct works were given by Parliament. They accordingly purchased these rights at the price of £6500, and they thus obtained whatever right the appellant at any time had to derive water power from Loch Humphrey and Loch Fyn, or to form embankments or breastworks, these being the appellant's whole rights of water and water power connected with the said lochs and streams.

The respondents pleaded, (5) the second alternative of the award being ambiguous in respect that it does not state whether the rights valued are rights in the lochs or in the burn or in both, the defenders should be assoilzied.

On the 24th of October, 1885, the Lord Ordinary (Lord Fraser) held that respondents were only liable to pay the £50, with interest from the 3rd of December, 1884, and he assoilzied them from the other claim. To this finding the Second Division on the 3rd of March, 1886, adhered (1).

On appeal,

May 4, 7. *Littler*, Q.C., and *Dundas* (of the Scotch Bar), for the Appellant:—

The judgment of the Court of Session is erroneous. At the date of the statutory notice the appellant was owner of all the rights in the water of the lochs except so far as he had devised them to the Dunns. But all he had parted with to them was a mere servitude right or burden of using the water and maintaining the dams for the purpose of the mills, and the respondents who bought out the Dunns could not make any use of the water of the lochs which was inconsistent with that servitude right, nor could they by virtue of that title divert the water into a new watershed. The respondents, under the powers of their special Act, obtained the valuable privilege of diverting the whole waters of the lochs with the exception of a small quantity sent down the burn, and as incident thereto a right to use the embankments for all time to come, thus increasing the burden and injuriously affecting the appellant's property. This is an action on the award, and if it is bad for vagueness then the House should decide what rights the appellant had in the water, and remit the case to the Court of Session to examine the arbitrator.

[*The Solicitor-General for Scotland*:—The respondents necessarily admit that the grantor of the disposition to the Dunns had a title to the lochs.]

The form of the award may be explained. The appellant argued that he was divested for ever of the use of the reservoir and embankments, and that, taking the value of the water, he

(1) 13 Ct. Sess. Cas. 4th Series, 636.

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had a right to divert 200-horse power so long as he returned the water again to the burn; and, secondly, in an alternative view, that the value of the water was the value of the solum, namely, twenty-seven acres at £50 per acre, or a total of £1350, which, with the value of the embankments added as one of the factors of value, made up the total value of £3000. Then the words "or any of them" meant that in fact only one thing was claimed, but that during the course of the debate before the arbitrator that one thing took several faces, and the arbitrator wished to leave it to be decided on the construction of the Act under which head that one thing claimed had been taken.

The Solicitor-General for Scotland (*J. P. B. Robertson*, Q.C.), and *W. C. Smith* (of the Scotch Bar), for the respondents:—

The appellant has failed in this action. It is not disputed that the Dunns could not do what the respondents are now doing; nor do the respondents desire to take any right without paying for it. But the appellant has not averred or pleaded any right or interest acquired or injuriously affected by the respondents for which he is entitled to compensation, and any rights he had were so exceedingly vague that he did not put them before the arbitrator.

The award must speak for itself, and on its face it is ambiguous. The embankments have not been taken, therefore on what footing has the sum of £1650 been assessed. Lord Campbell in *Caledonian Railway Company* v. *Lockhart* (1) said the award would be void if the arbitrator had "therein awarded beyond his authority anything to the prejudice of the appellants which could not be severed from what he has lawfully awarded within the scope of his authority." See also *Beckett* v. *Midland Railway Company* (2). Here, how is it possible to separate the value of the water from the value of the embankments, which are not taken?

Dundas, in reply.

LORD HALSBURY, L.C.:—

My Lords, in this case several difficulties have occurred in the construction of the award on which this action is brought, and it

(1) 3 Macq. at p. 813. (2) Law Rep. 1 C. P. 241.

becomes necessary to examine, I think, with some minuteness, not only the rights to which in fact Lord Blantyre is entitled, but to some extent the arguments by which some of those rights have been sought to be satisfied. The meaning of the award has been perhaps somewhat obscured by the effort on the part of the arbitrator to exclude such constructions of the instrument as might lead to further litigation, and leave in doubt that in respect of which he had intended to award compensation.

The position of the parties was this,—Lord Blantyre had parted with certain rights in respect of the water in his loch, which with respect to certain tenements on the burn he had impressed with a servitude which could not but be of importance to those tenements as long as they were continued and in operation for the purpose for which that servitude was granted, and this servitude was a sufficient supply of water to keep certain mills on the stream in operation as mills. The Dumbarton Waterworks Company had obtained an Act of Parliament which would have enabled them, had they thought proper, to appropriate both the banks of the loch and all necessary approaches to and interests in the loch for the purpose of supplying the town of Dumbarton with water. They appear to have obtained from those who had been grantees of the servitude to which I have referred an assignment of all the rights of those grantees; and in some way or another it appears to have been imagined that if an adit could be made to that portion of the burn or that end of the loch by buying a small piece of land, and then putting certain pipes in that small piece of land so as to adjoin the burn where it issues from the loch, they might by that expedient, and in right of the terms of the grant to the Dunns, who were the original grantees of the servitudes, conduct the water to Dumbarton and so supply the inhabitants of Dumbarton without any further payment to the proprietor of the loch than that which was involved in the purchase of this small piece of land and whatever adits or pipes and so forth as were necessary to connect the burn with the system of pipes which was to conduct the water to Dumbarton.

Now, my Lords, that appears to me to have been founded on a complete error. The servitude granted to the Dunns was one which could only be available for the purpose for which it was

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granted. The assignees of that servitude were not entitled to divert a single ounce of water from the loch except for the purpose of the servitude itself, and the company have taken the rights, whatever they were, from Dunn by assignment without taking the mills. They appear to me to have severed the servient tenement altogether from that which was the dominant tenement in respect of this servitude.

But another expedient appears to have occurred to the minds of those who were endeavouring to obtain the advantage of Lord Blantyre's loch without paying for it, and that was that inasmuch as by the Act of Parliament the riparian rights of all the proprietors along the burn were to be satisfied by what the legislature considered to be, and what probably was, an equivalent amount of water discharged down the burn so as to satisfy all the riparian rights down below it, if the water was abstracted from the loch not at any new entrance into the loch, but at some point of departure which should be within that portion of the burn which was already, as it were, equivalently supplied with water by this statutable quantity in lieu of any money compensation, then the process, the circuitous path, by which it was sought to arrive at the conclusion was; inasmuch as we do not take it from the loch but only take it from the burn, and inasmuch as the burn now is sufficiently supplied with water by the statutable amount of equivalents going down it, the moment we do that you become simply a riparian proprietor, you have no right to money compensation at all, and the consequence is that we can supply the whole town of Dumbarton without any money compensation to you because you are simply a riparian proprietor, and the rights of the riparian proprietors are extinguished by the quantity of water that is sent down the burn.

My Lords, it appears to me that that was an entire error; and I do not think there will be any difficulty at all or doubt in the mind of any one of your Lordships in coming to the conclusion that neither of the arguments to which I have referred could in the slightest degree impair Lord Blantyre's rights in the loch as proprietor of the loch and of the water therein contained. I can well understand that these arguments were pressed upon the arbitrator, and that the arbitrator was sought to be influenced by the considerations to which I have referred.

My Lords, I have thought it right to mention these arguments, unfounded as they appear to me to be, because I think that in these arguments will be found the source of the only difficulty which I have had in the course of this case, and that is as to the language of the award itself, whereby it would appear that the arbitrator has placed something in the nature of a money value upon the construction of the banks and the interest in the banks which Lord Blantyre possesses. My Lords, I cannot help saying that if that were the true construction of the award, and if I could come to the conclusion that the arbitrator had intended to value this in the sum awarded, and had given money value to it as a part of the award, I should have very great difficulty in saying that his award could be sustained. But I think that upon the true construction of his award, and looking at the language in which it is couched, what the arbitrator meant was this:—I value the right which Lord Blantyre has in this water as the proprietor of this loch, I value that to the Dumbarton Company, who are taking this water, at the sum of £3000, and that is the sum which I mean to award. And if he had left his award there without any further exposition, I believe that your Lordships need not have been troubled with the argument to which we have listened, because it would have been too plain, I think, that that was a perfectly good award, and that Lord Blantyre's rights upon the question which is now before your Lordships would be clearly established upon the facts which are proved before us. But I have no doubt that for the purpose of avoiding future litigation, and for the purpose of explaining what considerations and what sources of calculation had entered into his mind, the arbitrator has used the difficult phrase which has given rise to all this litigation, namely, that in which he seems to value the banks. Now I think upon a fair and reasonable construction of this award, the award is reconcilable with the view which I have suggested, and that all the arbitrator by the use of that language intended to convey was this: It must not be supposed that after I have valued this right of taking water at the sum of £3000 it will be competent to Lord Blantyre hereafter to come and say to the company, "Oh! yes, you have got the water but you must also pay me for the use of my banks." The arbitrator,

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I think, intended to say, what I mean to award by this, is that this is the gross sum to which Lord Blantyre shall be entitled in respect of his rights for the water which you, the company, are taking away, and in doing this I have come to the conclusion that there is a usefulness in this partly natural and partly artificial bank which has been raised to keep in the water which I am thus valuing as between vendor and vendee, between Lord Blantyre and the Dumbarton Company; and therefore let it not be supposed that I have not disposed of that question by the award at which I have arrived.

My Lords, if that is the true construction of the award, I must say, for myself, that I think that is right. The grant is what it would be if the water were not taken under the powers of the Act. It is a grant of water which Lord Blantyre makes out of his loch, and he certainly must not thereafter do anything wilfully which will defeat the grant which he has made, and therefore the banks ought not to be made themselves the subject of a separate assessment. The arbitrator says to him: "I have taken into consideration in my award the fact that this is partly an artificial loch which belongs to you, and this is one of the modes by which I have arrived at my gross sum of £3000; and therefore let it not be supposed that I have left uncovered any demand which you, Lord Blantyre, may possess, or may think that you possess, in respect of the banks which keep in this water, as in a natural basin."

My Lords, under these circumstances it appears to me that the award can be supported upon that construction; and as it is manifestly just that Lord Blantyre should be properly compensated in respect of the water which this water company has taken, not strictly under the powers of its Act at all, but by the expedient to which I have referred, I move your Lordships that the interlocutors appealed from be reversed, that the cause be remitted to the Court of Session, and that the respondents do pay to the appellant his costs both here and below.

EARL OF SELBORNE:—

My Lords, looking broadly at the justice of this case, I cannot but feel satisfaction with the result at which the noble and

learned Lord upon the woolsack has arrived, and which I have reason to believe will be embodied in your Lordships' judgment. That Lord Blantyre ought to be compensated for that which is taken from him, I think nobody who has the least regard to law or justice can doubt; nor do I think that any reasonable person would quarrel with the sum of £3000 as an excessive estimate of the compensation which should be made to him for the water of this loch.

My Lords, when I get out of that broad view of the case I must own that there are some difficulties which still remain upon my mind, though I am not prepared to give my voice against the judgment which has been proposed to your Lordships. One difficulty is the imperfect way in which the various points of this case have been presented in the judgments under appeal. The majority of the Court seem to have proceeded upon the second plea in law for the defenders, which was to this effect, that "the defenders should be assoilzied from the first conclusion of the summons in respect that the pursuer sold to Dunn his mills and whole rights in the loch and burn now claimed upon, with the exception of the right of using the water in the burn as defined in the feu disposition of 1854, which reserved right was compensated and discharged by the 9th section of the statute." If that was a correct view of the titles under the sale, as it is called, to Mr. Dunn, there can be no doubt that the decision of the Court below was correct; and, as I understand it, the majority of the Court did proceed upon that view of the case; and with regard to those who did not proceed upon that view of the case, I think they were embarrassed in some measure by the language and form of the award, which undoubtedly do present difficulties. The consequence is, that upon the points which appear to your Lordships to be the real points calling for decision after the present argument, we do not get that amount of assistance which, doubtless, we otherwise should have had from the opinions of those learned judges who did not proceed upon the transaction with Dunn. With regard to this point, raised by the second plea in law, which the majority of the learned judges of the Court below seem to have thought good, I believe there is no difference of opinion among your Lordships. To me, without going into

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any question as to what it may be which the Dumbarton Water Company have obtained from Dunn, it is perfectly clear that Dunn never had any rights whatever which can interfere with the claim of Lord Blantyre to compensation in this case. The dealing with Dunn was simply this: he had, for the purposes of certain mills, large rights given to him over the water in the loch which supplied the burn, and over the water in the burn; for those purposes, and those purposes only; and that being the construction which I should put upon the words (1) in the grant to Dunn taken by themselves, they being qualified by the words "connected with the mills hereby disponed," it is to my mind made absolutely clear and unequivocal by the terms of the exception in Lord Blantyre's favour, contained in the grant to Dunn: "Reserving always to me and my foresaids all our rights in the foresaid lochs and burn, except our rights therein connected with the mills." The question is, whether the right with which we are dealing now is a right connected with the mills. If it is, then it is affected by the sale, or whatever it ought to be called, to Dunn; but if it is not, it is not in the least degree whatever affected by it, and therefore it may be put aside as irrelevant. Is it so? What is the subject of the compensation sought? I turn to Lord Blantyre's claim. Lord Blantyre stated "that these lands included the greater part of Loch Humphrey and a portion of Loch Fyn, the waters of which flowed partly through his property into Loch Humphrey, and that the Loch Humphrey Burn or Duntocher Burn, which was the natural outlet of the waters of Loch Humphrey, flowed through his property for a distance of nearly two miles; that the water of the loch and burn was used for agricultural purposes, and was capable of being used for other more important purposes in its course through his property, and otherwise; that by the acquisition of the lands and wayleaves the Dumbarton Waterworks Commissioners would be in a position to abstract water from Loch Humphrey and from the burn flowing therefrom, with the result that his rights and interests would be most injuriously affected." "To abstract water" for what purpose? For the purpose of the mill, for which purpose it was given to Dunn? No. For the purpose of

(1) See ante, p. 635.

carrying it to supply water to the town of Dumbarton. Therefore he alleges rights which are manifestly excepted from the grant to Dunn, and he alleges that they would be injuriously affected by an operation of the waterworks commissioners, which Dunn could not possibly have performed under the grant to him. It appears to me that we must and ought to approach this case on the assumption that the dealing with Dunn and the subsequent acquisition of Dunn's title by the commissioners is purely and absolutely irrelevant.

That being so, the next point, which certainly appears to have been a matter of some difficulty to the learned Lord Justice Clerk, if I may judge from the terms in which he expresses himself in his judgment, was also in the first instance, and until the argument had proceeded to a certain point, a considerable difficulty to myself; namely, the peculiar phraseology and language of this award, which appeared at first sight to give the £3000, if Lord Blantyre had any interest in any part of the waters of the lochs or the burns; and inasmuch as some interest which he undoubtedly might have had in the waters of the burns was expressly compensated under the Act of Parliament, so as not to be the subject of any tenable claim for further compensation, it did at first sight appear to me that the terms of the award would give him compensation in a case which might fall under the 9th section of the Act. But further argument, especially the argument for the respondents, convinced me that this was not a correct interpretation of those terms of the award. The arbitrator did not take upon himself to decide the questions of law in the case, which depended upon the Act of Parliament and upon the facts, which facts were undoubtedly before him and are also before your Lordships. He reserved those questions of law, but upon a double hypothesis he found £3000 to be due as compensation. The hypothesis consisted, as was pointed out in the argument, of these two branches; first, that Lord Blantyre was entitled to some interest in the lochs and burns, or one or more of them, which if it had stood alone would have raised the difficulty to which I have referred; but, secondly, that he was also "entitled, notwithstanding" (I may paraphrase that as "having regard to") "the provisions contained in sects. 9 and

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10 of the Waterworks Act, to compensation in respect of such right or interest." Turning the rather long and involved language of the hypothesis as stated in the award into a shorter and simpler form, it comes to this. If he is entitled to any right or interest in either the lochs or the burns, or any of them, uncompensated by sect. 9 of the Act of Parliament, then I find the value of that interest, or the compensation which he is to receive in respect of the interference with it, to be £3000. Well, now, having regard to the facts, that seems to me to be a hypothesis which really in the end involves no difficulty at all. The 9th section expressly compensates him for all his interest in what I may call the preservation of the watercourse of the burns. If he had any other interest in the burns, not so compensated, it was quite right that the arbitrator should take that into account in the compensation which he awarded; and looking to the manner in which the respondents have thought fit to execute their works, by taking the water not directly out of the loch before it enters the burn, but just below the point of discharge of the water of the lochs into the burn, it is manifest to me that both in Lord Blantyre's claim and in this award the "burn" is properly put in, to exclude any quibble arising out of the way in which the waterworks company were actually taking the water. The compensation given by sect. 9 of the Act of Parliament for the injury which otherwise might have arisen to those entitled to the benefit of the burns in their regular and ordinary and natural course, plainly does not apply to any abstraction of water from the burns any more than from the lochs, for other purposes, as to which, so long as they had nothing to do with the mill, Lord Blantyre's right remained. That being so, the fact is, that the water is taken from the lochs, and that Lord Blantyre's interest in the lochs is unquestionable. At one time there seemed to be a doubt whether that was admitted upon the record; but that doubt ultimately disappeared, and it was not really disputed that it was to be taken as his established right and title. That interest being unquestionable, it is equally certain that the Waterworks Commissioners are taking the waters of the lochs, although they take them at a point just below the discharge of those waters into the burn, and they take

them not for purposes in any way connected with the watercourse of the burn but for wholly different purposes, the result being, in my judgment, exactly the same as if they had taken the water from any other point of the loch. Therefore, I do not now find any difficulty in construing the hypothesis. I think it is quite clear that Lord Blantyre has established his interest, and that it is not compensated under sect. 9 or sect. 10 of the Act of Parliament.

Then there remains the point about the £3000, and the way in which it seems to be divided upon the face of the award. Now there, I must confess, I have felt more difficulty than upon any other part of the case, and I do not pretend to say that my difficulty is entirely removed. It does seem to me that, according to the natural construction of the award, the arbitrator has, in the first instance, found the sum of £3000 as the compensation to be paid in respect of these several matters, first, "in respect of the right or interest to be acquired from Lord Blantyre in the foresaid waters," about which, if he had stopped there, I should have felt no doubt or difficulty whatever; but he goes on to say, "and the embankments at said Lochs Humphrey and Fyn," so that he mentions the embankments as a distinct subject in which some right or interest is to be acquired by the commissioners; "and the right to intercept and to appropriate the said waters," which, of course, would follow the waters themselves—no question arises upon that—"and for the damage to be sustained by him by or in consequence of the work of the commissioners."

Now, in order to see whether I am justified in waiving my difficulty, or rather in acquiescing in the construction proposed by the noble and learned Lord of the whole passage, the first question which I ask myself is this, Would the award have been bad if the arbitrator had stopped there, without saying anything about the £1650 apart from the rest—would it have been bad because he mentioned some right or interest to be acquired from Lord Blantyre in the embankments at Lochs Humphrey and Fyn? I confess that it would have been an assistance to me to have heard more argument upon that point than was offered on either side of the bar, but the best judgment which I have been able to form in the absence of that argument is, that it would be

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difficult to say that the commissioners acquired no right or interest in respect of the embankments. Under the Act of Parliament they had a right to take the waters. Under this award they would have paid for what they did in the exercise of that right. The waters are maintained in their place, and made capable of passing into the conduits of the waterworks company by reason of their being impounded by certain embankments; and if those embankments were taken away, I suppose that the means of carrying the water to Dumbarton might be either entirely lost or seriously impaired. Therefore it seems to be necessarily incident to the right acquired as against Lord Blantyre of taking the waters by paying for them, first of all, that whatever Lord Blantyre might before have been able actively to do in the alteration or destruction of these embankments, he can no longer do, if it be in derogation of the rights to the water which have been acquired and paid for; and, secondly, that even if Lord Blantyre is under no obligation at his own expense to maintain and keep in repair the embankments (as to which we have heard no argument one way or the other) yet at least the waterworks commissioners, if it were necessary, would, as incidental to their right to have the waters, have a right to do what was needful to keep them in their place by maintaining these artificial embankments on which that depends. So that I could not have held that the mere fact of the embankments being mentioned in that way, if nothing had been said about the £1650, vitiated the award.

My difficulty arises out of the words in which the arbitrator has separated the £1650 from the rest of the £3000, "including in said sum of £3000 the sum of £1650 as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn." Now at first sight, I confess, that looks very much like a statement by the arbitrator that he would not have given as much as £3000, but that his award would have been less by £1650, if he had not thought it right to give to Lord Blantyre the price or value of the embankments in the same way as if the embankments had been actually and bodily taken under the Act of Parliament. Of course he means the price or value to the waterworks company—that is evidently the proper interpretation—not the price at which they were originally constructed.

Whether it was so or not is not the question—it is not so upon the face of the award. Now I do not think that if that were the construction I could support the award in that respect. It appears to me that taking the incidental right to have the embankments in some way or other upheld, or at least not interfered with by Lord Blantyre, taking that as a separate item, it would not have been right for the arbitrator to value that, even if he had given a sum less important than £1650. But your Lordships think, as I understand, that the arbitrator has merely intended by those words to signify that in his giving the £3000 for that which was previously mentioned he has taken this into account, so that no separate question is at any time to be raised as to those incidental rights in respect of the embankments which the waterworks commissioners might acquire, and that he has treated the water as enhanced in its value by reason of the manner in which it is retained by the embankments and by reason of the rights in respect of the embankments which the waterworks commissioners would acquire. Your Lordships, I believe, think that, on the whole, the right construction to be placed upon the award; and although I feel, I confess, some difficulty upon the words "estimated price or value," yet I am not inclined to press that difficulty against your Lordships' opinion; and I am the less inclined to do so for this reason, which I think in this particular point of view is of importance—Lord Blantyre has made no separate claim in respect of the embankments—his claim manifestly relates to the interference with his water rights. If, as an element in computing the value of the water rights so interfered with, the arbitrator took into account the fact that the water must still be maintained and impounded by means of these embankments, and thought that a thing to be considered as between Lord Blantyre and the commissioners, it would surely be a very hard thing to say that it is to be imputed the award that it has introduced a new subject of claim which Lord Blantyre himself never made, and *that* for the purpose of vitiating a finding, which is very reasonable in its amount, and which is, I think, substantially just.

Under these circumstances, though I do not pretend to have my mind free from all difficulty as to the construction of these

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words in the award, I am not prepared to give my voice against the judgment which has been proposed by my noble and learned friend on the woolsack.

LORD WATSON:—

My Lords, the appellant is proprietor of the lands and barony of Kilpatrick in the county of Dumbarton, which include the greater part of a natural basin of water known as Loch Humphrey, and also an inconsiderable part of Loch Fyn, a small sheet of water which is one of the feeders of the larger loch. The outlet of Loch Humphrey is a burn, which runs in a southerly direction, for nearly a mile, through the appellant's lands, and thence along the eastern boundary of these lands, until it joins the Cochno Burn, which is in its turn absorbed by another stream called the Duntocher Burn. Many years ago, the storage capacity of Loch Humphrey was greatly increased by means of an artificial embankment erected across its outlet by the predecessors in title of the appellant.

On the 20th of February, 1854, the appellant, in implement of a previous agreement, disponed in feu to the late Alexander Dunn of Duntocher, several parcels of land either adjacent or near to the Duntocher Burn, with the mills thereon, and also his whole "rights of water power, and other rights connected with the mills hereby disponed, including all right I have to dam up and draw water from Loch Humphrey and Loch Fyn, or to form embankments or breastworks at said lochs." The appellant specially reserved to himself and his successors "all our rights in the foresaid lochs and burn, except our rights therein connected with the mills and with the pieces of ground and other rights above conveyed and granted." The effect of the disposition was to leave the property of the lochs and burn in the appellant, burdened with a praedial servitude of water power attached to the heritable subjects feued. So far as the water of the loch was not required for the purposes of the dominant tenement, or could be utilised by him consistently with these purposes, it remained subject to the disposal of the appellant: and on the other hand Mr. Dunn and his successors could not use their water rights except for the special objects for which they

were given. The servitude could not be communicated by them to any person who was not in right of the subjects to which it is attached.

The respondents are water commissioners for the burgh of Dumbarton, under an Act passed in 1883, the 6th section of which defines the works which they are authorized to make and maintain. One of these is a reservoir "being an enlargement of the reservoir or loch known as Loch Humphrey, in the parish of Old or West Kilpatrick and county of Dumbarton, to be formed by an embankment to commence at a point about twenty-three yards north-eastward from the point where the existing bye-wash issues from Loch Humphrey as aforesaid, and to terminate at a point about 210 yards westward from the said point of commencement;" the other is a line of pipes "commencing in the reservoir hereinbefore described" and terminating in the respondent's Garshake reservoir, which lies to the north-east of Loch Humphrey. The Lands Clauses (Scotland) Act, 1845, and the Waterworks Clauses Act, 1847, were incorporated in the Act of 1883; so that the respondents are admittedly bound to make due compensation for all interests in land, taken by them, or injuriously affected by their statutory operations.

The effect of the authorized works being to divert the water of the loch to Dumbarton, it is obvious that their execution must affect the interests of the appellant, both as riparian proprietor, along the course of the natural outlet, and as owner of the loch. For the first of these interests the appellant cannot claim to be compensated, because the 9th section of the Act provides that the respondents shall cause to be discharged down the burn a regular and continuous flow of not less than 320,000 gallons of water per diem, which is to be deemed to be sufficient compensation to mill-owners and all others interested in the waters of the burn. But sect. 10 expressly saves the rights of the appellant in Loch Humphrey, and his claims of compensation for any such rights as may be injuriously affected by anything done under or for the purposes of the Act.

If the respondents had chosen to execute the whole works authorized by sect. 6, it would have been necessary for them to take land for the site of the new embankment, and enlargement

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of the loch; and the supply of water obtained by that means would have been taken from the loch. In that case the difficulties which they have hitherto thrown in the way of ascertaining the appellant's just claims to compensation would never have existed. But, instead of strictly following their statutory powers, the respondents resorted to the following ingenious device. In June, 1884, they proceeded to take from the appellant, by notice, (1) one sixteenth of an acre of land, just outside the old embankment and its outlet, upon which they have constructed a couple of gauge wells, and (2) a wayleave for their pipe, which they did not insert in the loch, but connected with the old outlet. In the statutory arbitration which followed on the notice the appellant claimed compensation for his water rights in the loch; but the respondents have all along disputed his claim upon the ground that they do not take water from the loch, but from the stream which issues from it, and that the appellant is therefore fully compensated by the daily supply sent down the burn in terms of sect. 9. The argument is simply preposterous: their Act (sect. 8) authorizes the respondents to divert, appropriate, and use the waters of Loch Humphrey; and that is just what they are now doing.

The oversman valued the subjects included in the respondents' notice at £50, and with respect to the appellant's claim he found as follows:—In the event of its being admitted or judicially determined that the said Lord Blantyre had at the date of the foresaid statutory notice retained any right or interest in the waters of Loch Fyn or Loch Humphrey, and the streams called Loch Humphrey Burn and Duntocher Burn, or any of them, and that he is now entitled to compensation in respect of such right or interest, notwithstanding the provisions contained in sects. 9 and 10 of the Dumbarton Waterworks Streets and Buildings Act, 1883, or either of them, I hereby find and determine the sum of £3000 to be the amount to be paid by the said Dumbarton Waterworks Commissioners to the said Right Hon. Charles Lord Blantyre for or in respect of the interest to be acquired from the said Lord Blantyre by the said Dumbarton Waterworks Commissioners, in the foresaid waters, and the embankments at said Lochs Humphrey and Fyn, and the right to intercept and

to appropriate the said waters, and for the damage to be sustained by him by or in consequence of the work of the said Dumbarton Waterworks Commissioners, and that over and above the said sum of £50, including in the said sum of £3000 the sum of £1650 as the estimated price or value of the embankments made at Loch Humphrey and Loch Fyn."

The present action has been brought by the appellant for recovery of that sum of £3000. The Lord Ordinary (Fraser), as soon as the record was closed, assoilzied the respondents with expenses, being of opinion that under the feu conveyance of 1854 Alexander Dunn had "obtained a title to all Lord Blantyre's rights to the water in the two lochs"—a proposition so plainly untenable that it was practically given up by the respondents' counsel. The Second Division of the Court adhered to the Lord Ordinary's interlocutor. Lord Craighill was of the same opinion with Lord Fraser as to the effect of the feu right of 1854; but the majority of the Court, consisting of the Lord Justice Clerk (Moncreiff) and Lord Rutherfurd Clark, did not take that view. They were of opinion that the appellant retained important rights in the lochs, notwithstanding his disposition to Dunn; but so far as I can understand their judgments, they seem to have thought, either that the appellant had made no relevant statement of his interests said to be affected, or that these interests were not in reality prejudicially affected by the respondents' operations. The learned judges appear to me to have overlooked the fact that, apart from statutory authority, no person could, even with the full consent of Dunn or his representatives, have diverted a drop of the loch water to Dumbarton, without first obtaining the permission or acquiring the interest of the appellant; and that the value of that interest to persons taking it compulsorily is a matter for the determination, not of the Court, but of the tribunals to whom it is committed by the Lands Clauses Acts.

Besides their defences founded on the feu to Alexander Dunn, and on the assumption that they are not taking water out of the loch, but out of the stream, the respondents have at your Lordships' bar relied upon two pleas, the one being that the appellant has made no relevant allegation of his rights in the loch, and the

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other that the terms of the oversman's award of £3000 are so ambiguous that effect cannot be given to it.

No plea against relevancy is to be found in the record; and, if sustained, it would not entitle the respondents to the decree of absolvitor which both Courts below have given them. Moreover, the plea now urged is founded on defect of specification, and, if stated in the Court of Session, would probably have been met at once by an amendment of the record. It appears to me that, in the admitted circumstances of this case, the claim made by the appellant in his condescendence, which is practically identical with the claim narrated by the oversman in his award, is perfectly intelligible. The claim in both is for compensation in respect of those interests of his in the loch which the respondents have possessed themselves of, and are now enjoying under statutory authority. It is not disputed that the respondents are using the old loch as a reservoir, the waters of which they take to Dumbarton as a matter of right—a right which they could not enjoy, except by appropriating and using the appellant's proprietary interests. It is quite true that the respondents do not propose to acquire in property the alveus of the reservoir or the old artificial embankment; but they cannot acquire an interest in the water of the reservoir without also acquiring an interest in the basin which contains it, to the use of which they are by necessary implication entitled for the purpose of preserving its contents. These are interests taken by the respondents, with the result of imposing a new and perpetual burden upon the appellant's heritable estate.

To that part of the oversman's award which relates to the £3000 sued for, the respondents take two objections. In the first place, it is said, that the award fixes the same amount of compensation in respect of the whole, as in respect of any one or more of several rights to which the appellant might ultimately be found entitled by a Court of Law; and in the second place that it values the embankments on the footing that they were to be acquired in fee by the respondents. Both objections appear to me to be unfounded. The supposed ambiguity in the award, just as in the appellant's claim, is, in my opinion, mainly due to the strange device by which the respondents have sought to escape

from their statutory liabilities. The alternative words upon which they found were obviously introduced in order to make the award cover the appellant's interest in the loch water, whether the respondents took it from the loch itself, or abstracted it from the burn after it issued from the loch. As to the second objection, the oversman in the earlier part of the award gives £3000, not in respect of the embankments on the footing that they are to be acquired by the respondents, but in respect of the interest in these embankments which they must necessarily acquire, if they are to use the loch as a reservoir. I have had considerable difficulty with regard to the last clauses of the oversman's finding, but I have come to be of opinion with the Lord Chancellor that he did not intend to value the embankments as a separate subject at £1650. He merely refers to that sum as one of the factors which entered into his cumulo estimate of £3000. In valuing water alone the cost of works for storing it must be taken into account. The price of water in an artificial reservoir cannot be estimated on the same principles as that of water in a wholly natural basin. I see no reason to suppose that the arbiter erred in his mode of estimating those proprietary rights of the appellant, which the respondents have beyond doubt either taken or affected, and in my opinion he has valued no other rights.

I am accordingly of opinion that the interlocutors appealed from ought to be reversed, and a remit made to the Court of Session to decern in terms of the summons. I also think that the appellant ought to have his expenses in the Court of Session as well as the costs of this appeal.

LORD FITZGERALD:—

My Lords, from an early period of this hearing I had no doubt as to the decision at which in furtherance of justice your Lordships ought to arrive, if it was practicable to do so, namely, that Lord Blantyre should receive compensation from the council for the benefits of the reservoir and the supply of water for the burgh of Dumbarton which they took from that reservoir by a circuitous course, and under a claim of right now decided to be unfounded.

My Lords I concur willingly in a decision which defeats the device by which the council of Dumbarton sought to acquire this

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supply of water without paying just compensation for it. It is plain that a majority of the judges in the Court below proceeded upon, or were at least very much influenced and misled by, an erroneous construction of the grant to Dunn.

Lord FitzGerald.

My Lords, there has been considerable difficulty in the interpretation of the award, but on the whole I concur in the construction of that instrument adopted by your Lordships, and so fully expressed by my noble and learned friend opposite (Lord Watson).

My Lords I desire for myself to acknowledge the assistance I have derived from the clear argument of Mr. Dundas.

Ordered:

Interlocutor of the Lord Ordinary, except so far as the words "decerns against the defenders for the sum of £50 *and interest thereon at the rate of* 5 *per cent. from the* 3rd *of December,* 1884, *till payment" reversed; also the interlocutors of the Lords of Session of the Second Division appealed from reversed; cause remitted to the Court of Session to decern against the respondents for payment of the sum of* £3050 *with interest at the rate of* 5 *per cent. from the* 3rd *of December,* 1884, *until payment, including the said sum of* £50 *decerned by the Lord Ordinary; the respondents to pay to the appellant his costs both in this House and in the Court of Session.*

Lords' Journals, May 11th, 1888.

Agents for appellant: *Simson, Wakeford & Co., for Dundas & Wilson, C.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Murray, Beith & Murray, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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1888
Aug 10

LORD PROVOST AND MAGISTRATES OF GLASGOW . . . . . } APPELLANTS;

AND

FARIE . . . . . RESPONDENT.

Mines and other Minerals—Compulsory Purchase of Surface—Whether Clay is included in "other Minerals"—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17)—*Scotch Railways Clauses Act* (8 & 9 *Vict. c.* 33), *s.* 70—*English Railways Clauses Act* (8 & 9 *Vict. c.* 20), *s.* 77.

The 18th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." The appellants, by virtue of the Act and a conveyance containing a reservation of the "whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847," purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants' boundary, claimed the right to work out the clay under the land purchased by the appellants.

Held, reversing the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 346) (LORD HERSCHELL dissenting), that common clay, forming the surface or subsoil of land, was not included in the reservation in the Act, and that the appellants were entitled to an interdict restraining the respondent from working the clay under the land purchased by them.

APPEAL from the First Division of the Court of Session, Scotland (1).

The Lord Provost and Magistrates of Glasgow, the appellants, raised this action against Allan Farie, the respondent, and proprietor of the lands of Westthorn, near Glasgow, for declarator and interdict that they, as commissioners appointed by and acting under the Glasgow Corporation Waterworks Act of 1855, and Acts explaining and amending the same, are heritable proprietors of two pieces of ground extending to about twenty-one acres, part of the lands of Westthorn, disponed to them by the respondent's predecessor.

(1) 14 Ct. Sess. Cas. 4th Series, 346.

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The question raised by the action was whether the appellants were the proprietors of a valuable seam of clay forming the subsoil of these twenty-one acres, and entitled to prevent the respondent from working out the same.

The appellants' special Act incorporated the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19).

By disposition dated the 16th of February, and recorded the 2nd of March, 1871, the respondent's predecessor in the lands, the late James Farie, of Farme and Westthorn, sold to the appellants, in consideration of the sum of £11,000, as the agreed-on price or value of the lands therein disponed, two pieces of ground, described as follows: In the first place "All and whole that piece of ground lying within the barony parish of Glasgow;" then follow the measurement and boundaries. In the second place "All and whole that strip or piece of ground," &c., "which two pieces of ground extend together to" nearly twenty-one acres, and are delineated on a plan subscribed by the said James Farie, as relative to the said disposition. The disposition contained this reservation, "excepting always, and reserving to me and my foresaids, the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Waterworks Clauses Act, 1847."

In March, 1885, the respondent had worked the seam of clay to within thirty feet of the boundary of the appellants' land, and intimated to them that, in virtue of the reservation in the conveyance and the 18th section of the Waterworks Clauses Act (1), he was desirous of working the seam of clay under the ground

(1) Sect. 18 of the Waterworks Clauses Act, 1847, is: "And with respect to mines, be it enacted as follows: The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein, and conveyed thereby." Compare sect. 70, Railways Clauses Act (Scotland), 8 & 9 Vict. c. 33; and sect. 77, Railways Clauses Act (England), 8 Vict. c. 20.

acquired by the appellants, and called upon them to state whether they would avail themselves of their right to prevent his working the seam by making compensation.

The appellants maintained that the seam of clay was included in their purchase and did not fall within the terms of the clause of reservation, and raised this action.

The appellants averred (cond. 1): By the Act 29 & 30 Vict. c. 328, amending the 18 & 19 Vict. c. 118, the pursuers were authorized, inter alia, to make and maintain in the lines and according to the levels described on a plan, &c., the reservoirs, pumping-station, and conduits, and main pipes described in the said Act, and to take such of the lands delineated on the said plan, as might be required. "The lands ultimately acquired from the late Mr. James Farie, of Farme and Westthorn, the respondent's predecessor, were delineated on the said plan. The appellants, in December, 1865, caused pits to be dug to a depth of about six feet upon the lands on which they proposed to construct their operations, and found the subsoil at a depth of about two feet from the surface to consist of the ordinary clay which is known to extend over the whole of this district, and which they considered most suitable for the construction of their works. The appellants obtained permission from Mr. Farie, in 1866, to make borings in the said lands for the purpose of ascertaining the nature of the strata underneath. The result of these borings shewed that, at about two feet below the surface (which consisted of ordinary soil and loam), the subsoil consisted of ordinary red clay, which reached, in the boring made in the centre of the ground on which it was proposed to construct the reservoirs, to a depth of about six fathoms, with about nine fathoms of mud and sand below. In giving such permission Mr. Farie, who was well aware that the subsoil of the said lands consisted mainly, if not entirely, of clay, stipulated that the rock beneath the clay should not be pierced, in order to secure that the surface-water should not flow into the old coal workings below. About February, 1868, the appellants' engineer had a meeting with Mr. Farie with reference to the minerals in the said lands, when he was informed by Mr. Farie that the Ell and main coal, being the seams lying nearest to the surface, had all been worked out

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before 1832 by his predecessor, and that the hump and splint coal lying at a depth of thirty-seven and forty-one fathoms respectively beneath the surface still remained unwrought. The clay, which was known by both parties to exist in the said lands, was not referred to." In 1869 a plan shewing the ground proposed to be taken with relative notice was served upon Mr. Farie in terms of the Waterworks Clauses Act, 1847, and of the Land Clauses Consolidation (Scotland) Act, 1845.

The appellants, "after entering upon an arbitration, came to an amicable arrangement with Mr. Farie, whereby they agreed to pay him £11,000 for the same. In fixing the said price, which is at the rate of £600 an acre, no reference was made to the clay or to any materials in the said lands, except the unwrought coal aforesaid."

The respondent's answer to this condescendence admitted that Mr. Farie knew there was clay in the lands in question, but, quoad ultra, denied.

(Cond. 3.) "Two reservoirs, each 350 feet long, 205 feet wide, and 10 feet deep, each capable of containing $3\frac{3}{4}$ million gallons of water, have been constructed by the pursuers upon the said lands, partly by excavation and partly by embankment, the excavation being carried into the clay sufficiently far to give enough of that material to form embankments. These, with the engine and boiler-houses, main pipes, roads, and embankments, occupy about fifteen acres of the land purchased, leaving about six acres for duplicate reservoirs. The works authorized by the appellants' Act had cost £100,000, of which about £52,000 had been expended upon the lands acquired from Mr. James Farie. The purpose for which the lands were acquired was well-known to Mr. James Farie, who was also well aware that the existence of clay below the surface was the principal inducing cause for the appellants making the purchase; and the said reservoirs were constructed in his knowledge and without any objection by him. It was understood and agreed between the respondent's predecessor and the appellants that the whole clay in the lands was included in the said purchase, and that the clause reserving coal and other mineral did not comprehend clay. The northern portion of the said lands, not being at

present required for the works, is let by them for grazing purposes."

The respondent's answer alleged that the appellants' "works do not occupy more than seven acres, and are in no place ten feet in depth. The statement as to the depth, capacity, mode of construction, and costs of the appellants' works," are not known and not admitted.

(Cond. 4.) "The said seam in the lands of the appellants lies very near the surface of the ground, at an average depth of only two feet below it, and it cannot therefore be worked by mining. The respondent accordingly works the clay on his own lands at present "open cast"—that is, by means of an open quarry into the said seam, and his workings at present extend to within about thirty feet of the boundary of the appellants' land. If the said workings are extended into the appellants' land, the soil will be lost, and the ground will cease to have any agricultural or feuing value. It will also be rendered useless for the construction of reservoirs by the appellants owing to the removal of the clay, which is necessary for that purpose; and any reservoir which could possibly be constructed in the bottom of the excavation left by the respondent would be at too low a level for the appellants' purposes. Neither could the clay be worked by mining or open cast below or near the existing reservoirs and other works without entirely destroying them, or at least endangering their stability."

To this the respondent answered; "admitted that the workings in the respondent's lands are about thirty feet from the appellants' lands," "not known and not admitted what the effect of working the clay would be." "Quoad ultra denied, subject to the following explanations:—The clay falls within the reservation in the disposition, and statute. The said clay is a mineral in the sense of the Waterworks Clauses Act, 1847, and the said disposition. It is used for the manufacture of bricks, and is of very great value. It is estimated that the clay in the lands in question, which the respondent would be prevented from working if the appellants were to obtain the decree and interdict they ask is worth not less than £10,000. The said seam of clay, so far as already wrought in the ground adjoining that in question, has

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been wrought open-cast, but previous tirring of the surface is not necessary. The greatest depth of the workings in the adjoining ground has been from twenty to thirty feet."

The Lord Ordinary (Lord McLaren) decided in favour of the appellants by interlocutor dated the 16th of December, 1885; but this decision was reversed (1) by the judges of the First Division (the Lord President (Inglis), Lord Shand, and Lord Adam) by interlocutor dated the 21st of January, 1887 (Lord Mure dissenting).

On appeal,

Nov. 28, 29; Dec. 1, 2, 1887. Sir *R. E. Webster*, A.G., and *Balfour Brown*, Q.C., for the appellants:—

The clay in question is the appellants' property (1.) in virtue of the disposition; and (2.) because it does not fall within the clause of reservation in the terms of the Waterworks Clauses Act of 1847. It is the only possible subject of the grant, forming, as it does, "that piece of ground" conveyed. In a private Scotch deed of conveyance a reservation of the "Haill mines and minerals" does not comprehend such a substance as fine stone suitable for building, which can only be obtained by quarrying: *Menzies* v. *Breadalbane* (2); *Duke of Hamilton* v. *Bentley* (3), and no different rule can apply in the case of common clay such as this. Sect. 18 of the Waterworks Clauses Act is the same as sect. 77 of the English Railways Clauses Act and 70 of the Scotch, and these Acts were not intended to make any change in the signification of the word "minerals." All the *Great Western Railway Co.* v. *Bennett* (4) decided was that, while previously the rights of the vendor to work minerals which he had expressly reserved were controlled by the corresponding common law right of the purchasers to have subjacent and adjacent supports, now since the Acts this common law right to support is abolished in the case of a statutory purchaser, and the vendor is entitled to work out his minerals irrespective altogether of the obligation of support; and if the statutory purchaser wants support from

(1) 14 Ct. Sess. Cas. 4th Series, 346.
(2) June 10, 1818; 19 F. C. 531; 1 Shaw App. 225.
(3) 3 Ct. Sess. Cas. 2nd Series, 1121.
(4) Law Rep. 2 H. L. 27.

minerals he must pay for it. In the Court of Session the Lord President was of opinion that the term "minerals" meant everything under the surface, however deep; but suppose the case where the surface is part of the mineral, or where the surface is gravel, which goes down twenty feet, where in such cases is the surface line to be drawn? The next substratum of the clay might have been coal, and if the clay is a mineral, where is the working to stop, and on what level are the appellants to erect their reservoirs. In *Hext* v. *Gill* (1) Mellish, L.J., said: "The result of the authorities appears to be this: that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Here the pleadings give an exact statement that this clay was known to exist, and that the respondent's author knew that the land was selected because of this clay. It is clear therefore that the clay was the subject-matter of the grant, for otherwise if the respondent's author had intended to reserve it he would have used distinct language to that effect. In that case Mellish, L.J., gives as a test commercial value, but that is a very unsatisfactory criterion, as it is well known that substances which are really minerals have been thrown away as commercially unprofitable.

In *Bell* v. *Wilson* (2) the Lords Justices, although they held, varying the decree of Kindersley, V.C., that freestone was included in a somewhat similar reservation, they concurred with him that the grantor had no right to get freestone by quarrying. There Turner, L.J., was of opinion that the word "mines" referred to underground working. And the Appellants submit the Waterworks Clauses Act and the Railways Clauses Acts refer to substances in the nature of minerals which can only be worked out by means of mines: see *Darvill* v. *Roper* (3).

Besides, the reservation in the Act was "mines of coal, ironstone, slate, and other minerals;" therefore it must be a mineral

(1) Law Rep. 7 Ch. 699, at p. 712.
(2) 1866. Law Rep. 1 Ch. 303; 35 L. J. (Ch.) 337.
(3) 1855. 3 Drew. 294, at pp. 299 300.

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ejusdem generis, and therefore not clay; and sect. 12 of the Act mentioning earth and stone in addition to mines.

[LORD HERSCHEL referred to *Jones* v. *Cwmorthen Slate Company* (1).]

There is no doubt that the *Midland Railway Company* v. *Checkley* (2) is an authority against the appellants; but there the reservation was much wider than that here, and clearly included quarrying.

In *Loosemore* v. *Tiverton and North Devon Railway Company* (3), where *Hext* v. *Gill* (4) was cited, Fry, J., held that there was no such restrictive context there as Mellish, L.J., referred to, and his Lordship, being of opinion that the clay was of commercial value, held it to be a mineral within the 77th section of the English Railways Clauses Act. *Jamieson* v. *North British Railway Co.* (5) followed the English cases of *Rosse* v. *Wainman* (6) and *Micklewaite* v. *Winter* (7). The point in *Caledonian Railway Company* v. *Dixon* (8), whether the mineral owner could work out the limestone by open cast workings, although decided against the railway company in the Court of Session, was not brought up to this House on appeal (9). In *Nisbet Hamilton* v. *North British Railway Company* (10) Lord Adam said common earth and sand are minerals; but no one will contend that they are intended to fall within the description of minerals in the 70th section of the (Scotch) Railways Clauses Act. In this case, as the subject is common clay, his Lordship, to be consistent, ought to have held that the clay was not the property of the respondent.

Midland Railway Company v. *Haunchwood Brick and Tile Company* (11) decided that the word "mines" in sect. 77 of the English Railways Clauses Act includes minerals whether got by

(1) Law Rep. 5 Ex. Div. 93.
(2) 1867. Law Rep. 4 Eq. 19.
(3) 1882. 22 Ch. D. 25, at p. 42.
(4) Law Rep. 7 Ch. 699.
(5) 6 Sco. Law Rep. 188.
(6) 14 M. & W. 859.
(7) 20 L. J. (N.S.) (Ex.) 313.
(8) 11 Feb. 1879. 7 Ct. Sess. Cas. 4th Series, at p. 217, note 219.
(9) 5 App. Cas. 820. See Kay, J., in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1882), 20 Ch. D. 552.
(10) 13 Ct. Sess. Cas. 4th Series, 454, at p. 461.
(11) 1882. 20 Ch. D. 552.

underground or by open workings, and that therefore a bed of clay on which the railway had been made was as a mine excepted out of the conveyance of the land to the railway company: *Miles* v. *Midland Railway Company* (1) followed. But the appellants submit those cases are wrong so far as they held common clay to be a mineral within the meaning of the Act.

The Waterworks Clauses Act is not an Act in force until it is incorporated; here the private Act is Scottish, and therefore the Waterworks Clauses Act must be construed in accordance with the rules of the Scottish Common Law.

[They also cited *Brown* v. *Chadwick* (2); *Listowel* v. *Gibbings* (3); *Whitehouse* v. *Wolverhampton and Walsall Railway Company* (4); *Attorney-General* v. *Welsh Granite Company* (5).

Sir *Horace Davey*, Q.C., and *E. W. Byrne*, for the respondent:—

The question which the respondent desires to argue is whether the appellants are proprietors of this clay. The respondent maintains that the clay is within the reservation and that he has a right to it, but he does not claim to take away that which has been used for the purposes of the works. It must be remembered there are 21 acres, and that they are not all covered with works. The appellants ask what is it they have bought. The respondent contends that what the appellants bought on the construction of the Act, was (1) the surface; (2) the right to dig "and use any of the reserved part necessary for their works"; (3) the benefit of subjacent and adjacent support without paying for it, until they receive notice that the respondent, as mineral owner, desires to work the minerals; (4) the privilege of purchasing, and compelling the owner to accept compensation for such minerals as they desire to be left within a certain distance. These were all very valuable rights. It is fallacy to say that the use of the word "mines" in the statute points to substances got by mining. Mines of gold and silver, iron, and diamonds are often worked otherwise than by underground tunnelling. The meaning of

(1) 30 Ch. D. 634; 33 Ch. D. 632.
(2) 1857. 7 Ir. Com. Law, 101.
(3) 1858. 9 Ir. Com. Law, 223.
(4) Law Rep. 5 Ex. 6.
(5) 35 Weekly Reporter, 617.

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"mine" given in the dictionaries is sufficiently general to cover this case. Littre's Dictionary, vol. ii. pp. 565, 566, defines "mine," "Gite au sein de la terre d'où l'on extrait des metaux, des combustibles, des gemmes, &c.;" and "mineral" as, "Tout corps non organisé, qui se trouve dans l'intérieur de la terre ou à sa surface." See also Latham's English Dictionary; That a "Quarry is a stone mine"; and Jacob's Law Dictionary, "Mines are quarries or places whereout anything is dug;" and are likewise "hidden treasure dug out of the earth."

[LORD HALSBURY, L.C., referred to Cunningham's Law Dictionary, vol. 2, case of *Clavering* v. *Clavering*, Nov. 10, 1729.]

With regard to the words in the section "under the said land" purchased, the clay here is two feet under the surface; and the exception giving the undertakers the part dug and used in their works shewed that the minerals reserved might be very near the surface. In the Railways Clauses Acts that may be said to refer to tunnels, but in the Waterworks Clauses Act the same exception is used as to waterworks. In *Midland Railway Company* v. *Checkley* (1) Lord Romilly, M.R., said: "Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire-clay, or the like, comes within the word 'mineral,' when there is a reservation of the mines and minerals from a grant of land." And whether *Hext* v. *Gill*, is correct or not that case is valuable for the opinion of Mellish, L.J., that (2) "The word 'mines' before 'minerals' does not restrict the meaning of the more general word 'minerals';" and that "a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give a more limited meaning." This view was also adopted by Sir M. Smith, in delivering the opinion of the Court in *Attorney-General for Isle of Man* v. *Mylchreest* (3). See also Wickens, V.C., *Hext* v. *Gill* (4).

(1) Law Rep. 4 Eq. at p. 25.
(2) Law Rep. 7 Ch. at p. 712.
(3) 4 App. Cas. at p. 307.
(4) Law Rep. 7 Ch. p. 705, n.

The respondent submits there is nothing in the nature of the transaction here to cut down or qualify the general meaning given in those cases to the word "minerals." In *Metropolitan Railway Company* v. *Errington* (1) the railway company, having already acquired the surface land, thought it wise also to purchase the minerals under those lands, consisting of gravel and clay.

Previous to the Waterworks Clauses Act, Lord Wensleydale, in *Rosse* v. *Wainman* (2), decided that the word "minerals" was not to be understood in its general sense, signifying substances containing metal, but in its proper sense as including all fossil bodies or matters dug out of mines. And that "'mines,' according to Jacob's Dictionary, are 'quarries or places where anything is digged,'" therefore "beds of stone, which may be dug by mining or quarrying, are properly minerals."

[LORD HALSBURY, L.C.:—That was a lord of the manor case, and the fact that the lord had a right to everything under the surface was the foundation of Lord Wensleydale's judgment.]

In *Dixon* v. *White* (3) this House agreed with Wickens, V.C., in *Hext* v. *Gill* (4), that the titles may shew that the surface is held on the terms that the owner of the minerals is at liberty to remove the whole of them without leaving any support to the surface. To confine sects. 18, 22, 23, 24, and 26 of the Waterworks Clauses Act to underground workings, and to hold that clay is not a mineral would deprive the undertakers of the valuable rights of compulsory purchase and inspection of substances worked within a certain distance, and of the provision which requires notice of the intention to work. It was said that where undertakers take land for the special purpose of waterworks that the conveyance must be construed as conveying clay as necessary to the execution of the works, as decided by *Caledonian Railway Company* v. *Sprot* (5), and *Elliot* v. *North Eastern Railway Company* (6). But the latter case came to this House in 1863, under a private

(1) 19 Ch. D. 559.
(2) 14 M. & W. 859.
(3) 1883. 8 App. Cas. at p. 843.
(4) Law Rep. 7 Ch. 705, n.
(5) 1856. 2 Macq. 449; 16 Court Sess. Cas. 2nd Series, 559: see also *Caledonian Railway* v. *Belhaven*, 3 Macq. 56.
(6) 10 H. L. C. 333.

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railway Act of 1834, which did not include the Railways Clauses Act, and was decided on the authority of the previous case—a case which turned not upon the Railways Clauses Act but upon the terms of a private conveyance. But since those cases the *Great Western Railway Company* v. *Bennett* (1) has decided that the Railways Clauses Acts, and therefore the Waterworks Clauses Act, has introduced a new code, by which alone the rights and relations of the undertakers and the mineral owner are to be regulated and settled. That case decided that a railway company purchasing under the Railways Clauses Act does not become entitled to support, which is the thing most wanted, until they pay for it. There Lord Westbury said: In face of the words in sect. 77 of the English Act, "there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." Kay, J.'s judgment in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (2), and Lord Kinloch, in *Jamieson* v. *North British Railway Company* (3), are arguments in the respondent's favour. The appellants rely on the fact that this is a Scotch conveyance, and cite *Menzies* v. *Breadalbane* (4); but that was a case of a feu, a grant which must be very strictly construed against the superior; and the *Duke of Hamilton* v. *Bentley* (5) followed *Menzies' Case* (4). When construing a general statute a different meaning ought not to be given to a word appearing in that statute in an English from that given in a Scottish case.

Sir *R. E. Webster*, A.G., in reply.

Judgment after consideration.

LORD HALSBURY, L.C.:—

My Lords, I cannot conceal from myself the importance and the difficulty of the question involved in this case. The conse-

(1) Law Rep. 2 H. L. 27, at p. 41.
(2) 20 Ch. D. 552.
(3) 6 Sco. Law Rep. 188.
(4) 19 F. C. 531; 1 Shaw, App. 225. The case of a lease, *Colquhoun* v. *Watson* (15th Feb. 1668), 1 Stair Rep. 527, was cited to Lord Eldon: see record of *Menzies' Case*.
(5) 3 Court Sess. Cas. 2nd Series, 1121.

quences flowing from a decision either way seem to me to be very grave, and I desire, therefore, to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships. That question may be very summarily stated as to whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act, 1847.

I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by James, L.J., in the case of *Hext* v. *Gill* (1), which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority so that he yielded to the technical sense which had been attributed to those words I still think (to use his language) that a grant of "mines and minerals" is a question of fact "what these words meant in the vernacular of the mining world, the commercial world, and landowners," at the time when they were used in the instrument.

I will not at present say how far I think we are bound by authority, because, as I have already intimated, I desire to keep myself entirely free if the question should arise in this House with respect to any other statute, or with respect to any grant not controlled by the statute in question in which the words "mines and minerals" occur.

It may be that I am influenced by the considerations to which Wickens, V.C., referred (2), when he said that it might be thought that some inclination had arisen "on the part of judges to give more weight than ought to have been attributed to some small circumstances of context" in order to cut down the proper and ordinary meaning of the words "mines and minerals." I think no one can doubt that if a man had purchased a site for his house with a reservation of mines and minerals neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon which his house was built under the reservation of mines and minerals.

There is no doubt that more accurate scientific investigation of the substances of the earth and different modes of extracting them have contributed to render the sense of the word "minerals" less certain than when it originally was used in relation

(1) Law Rep. 7 Ch. at p. 719. (2) *Hext* v. *Gill*, Law Rep. 7 Ch. note at p. 705.

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to mining operations. I should think that there could be no doubt that the word "minerals" in old times meant the substances got by mining, and I think mining in old times meant subterranean excavation. I doubt whether in the present state of the authorities it is accurate to say that in every deed or in every statute the word "minerals" has acquired a meaning of its own independently of any question as to the manner in which the minerals themselves are gotten.

Mellish, L.J., in the case to which I have already referred, sums up the authorities by saying (1) that the word "mines" (to use his Lordship's language) "combined with the more general word 'minerals' does not restrict the meaning of the word 'minerals';" and he says that the result of the authorities appears to be "that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." I cannot myself assent to such a definition. In the first place it introduces as one element the circumstance that the substance can be got at a profit. It is obvious to see that if that is an essential part of the definition the question whether a particular substance is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next.

If, on the other hand, one is to have recourse to etymology or science, and to disregard the mode of working as reflecting any light on the nature of the substance, it is obvious to inquire whether coal is a mineral. Its vegetable origin would to some minds exclude its being regarded as a mineral, while the substance kaolin was held by Wickens, V.C. (2), to be a mineral. "According to the evidence, kaolin, or china clay, is a metalliferous mineral perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it was not commercially profitable to work in England for the purpose of extracting metal from it."

(1) *Hext* v. *Gill*, Law Rep. 7 Ch. at p. 712.

(2) *Hext* v. *Gill*, Law Rep. 7 Ch. note at p. 705.

My Lords, the difficulty of dealing with this case is not diminished, but rather increased by the state of the authorities upon the question. In *Bennett* v. *Great Western Railway Company* (1) all that was decided in this House was that the common law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface-owner and the mine-owner, and gives power to the mine-owner to work his minerals unless the railway company purchases or gives compensation to the mine-owner for leaving his mines unworked. In that case it was admitted that the word "minerals" was properly applicable to the substances to be worked, and the only question was the application of the common law principle to which I have adverted. But the legislature must have meant something by the distinction which it recognises and acts upon in drawing the distinction which, as matter of business and understanding in the mining and commercial world, I think everyone must be familiar with.

My Lords, it appears to me that the effect of some of the decisions pushed to their logical consequences would be altogether to efface the distinction which all the statutes recognise. One might summarise these decisions and say a mineral need not be metallic. It need not be subjacent; it need not be worked by a mine; it need not be in any one particular distinguished from any part of the substance of the earth, using the word "earth," as applicable to every portion of this habitable globe. Even the word "organic" must be rejected if referred to some of the substances which form part of the earth. The bones of extinct animals are limestone, and as curiosities for research and scientific inquiry would find a ready market, and would therefore come within that part of the definition which requires that they should be capable of being profitably worked. Are they minerals?

My Lords, I find myself called upon to construe these words with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, and having relation

(1) Law Rep. 2 H. L. 27.

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to Scotch land and Scotch mines or minerals. I am not insensible to the observation that this is only one of a group of statutes which may be supposed to have had the same object, and might be therefore assumed to use the same phraseology in the same sense. Still I am construing the application of general words to a purchase under the statutes made in Scotland, and if there be any difference in the law of Scotland from that of England the legislature must be supposed to have been familiar with it and to have legislated accordingly.

Now the case is stated by the Lord Ordinary thus: "Here the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface, I ask myself, Did anyone who wanted to purchase or acquire a clay-field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay-field was not within the fair meaning of the reservation. That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed. The consequences of the reservation are different, but the thing to be reserved is to my mind essentially the same, being neither more nor less than the right to work such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers, or superiors and feuars."

My Lords, if that is the correct view, and I find myself unable to differ from it, I think the case of *Lord Breadalbane* v. *Menzies* (1) is a binding authority in this House. There the words were "haill mines and minerals of whatsoever nature or quality," and were held not to include a vein of stone suitable for building.

(1) 1 Shaw Ap. 225.

I feel it impossible to resist the reasoning of Lord Mure (1) in this case, but I hold myself free if the question should arise in England to consider quite independently of this decision what may be the law as applicable to an English case. I only regret that the test which James, L.J., suggested, and which I think would have been the true one, and would have satisfied all difficulties, was not adhered to in *Hext* v. *Gill* (2). In that case, as I have pointed out before, the substance which was called China clay was assumed to be metalliferous ore, and it was held that though the lord of the manor had reserved it he could not work it, because he had not also reserved a right so to work it at the expense of the surface-owner.

My Lords, I hesitate very much to adopt the reasoning of that case notwithstanding the high authority by which it was decided.

I am satisfied with the view so clearly put forward by Lord Mure (1), and upon the reasoning of that learned Lord's judgment I move your Lordships that the interlocutor appealed from be reversed.

LORD WATSON:—

My Lords, the question raised for decision in this appeal, which is one of general importance, has led to differences of judicial opinion in this House, as well as in the Court of Session. For my own part, I have experienced considerable difficulty in forming an opinion upon it, owing to the very indefinite terms which the legislature has used to describe the minerals reserved by statute to proprietors whose land is compulsorily purchased, for the purposes of railway or waterworks undertakings. The present controversy is between a statutory body of water commissioners, and a landowner who is now asserting his right to work out a seam of clay within a parcel of ground, about twenty-one acres in extent, which they acquired from him, under compulsory powers, in the year 1871; but the question which your Lordships have to consider would, in my opinion, have been precisely the same if the purchasers had been a railway company.

The Court below disposed of the case without inquiry into the

(1) 14 Court Sess. Cas. 4th Series, at p. 354. (2) Law Rep. 7 Ch., at p. 719.

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facts, and these must consequently be gathered from the statements made by the parties on record, which are, unfortunately, in some respects, conflicting. It appears, however, and it was assumed in the arguments addressed to us, that the seam in dispute is composed of ordinary sub-soil clay, such as is generally found throughout the district: that it lies at a depth of not more than two or three feet below the surface of the soil: that it is of considerable, but variable, thickness, and that it has been wrought open cast by the respondent in close proximity to the appellants' land, where its extreme thickness has proved to be from twenty to thirty feet. Since their acquisition of the ground the appellants have constructed upon it two reservoirs, each capable of storing nearly 4,000,000 gallons of water, which have been sunk into, and now rest upon, the clay.

The 18th section of the Waterworks Clauses Act, 1847, is identical, mutatis mutandis, with sect. 77 of the English, and sect. 70 of the Scotch, Railways Clauses Act of 1845. [His Lordship read the section (1).] The Act of 1847 is a British statute, whereas there is separate railway legislation for England and Ireland on the one hand and Scotland on the other; but it does not appear to me to admit of doubt that the legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries.

In considering whether sub-soil clay, such as we have to deal with in the present case, is one of the "other minerals" meant to be excepted, I have been unable to derive much assistance from such authorities as *Menzies* v. *Earl of Breadalbane* (2), in which it was held that the reservation by a superior, in a feu-contract, of the "haill mines *and* minerals" that might be found within the lands disponed in feu, did not give him right to a freestone quarry. Irrespective of other consideration which differentiate that case from the present, there is little analogy between a reservation of minerals coupled with an obligation to support the surface, and a reservation not only of the minerals, but of the right to work them without giving support. Nor have I been able to obtain much light from *Hext* v. *Gill* (3) and other English

(1) The section is printed in Lord Herschell's opinion, *post*, 680.
(2) 1 Shaw Ap. 225. (3) Law Rep. 7 Ch. 699.

cases referred to in the opinion of Lord Shand, which his Lordship seems to regard as almost decisive of the present question. The only principle which I can extract from these authorities is this; that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or act embodies. "Mines" and "minerals" are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used. In *Menzies* v. *Earl of Breadalbane* Lord Eldon observed (1) that the reservation "is not contained in a lease, but in a feu; and I take it, there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease—it is a question of a very different nature." In *Hext* v. *Gill* (2) the controversy, which related to China clay, worked for the purposes of obtaining the felspar which it contained, arose between the lord of the manor and the purchaser of the freehold of a copyhold tenement within the manor, under a contract which excepted "all mines *and* minerals," and in these circumstances it was sufficiently clear that the copyholder had only right to the surface, and had no right to minerals of any kind.

I need not refer in detail to the provisions of the Waterworks and Railways Clauses Acts which follow, and are connected with the sections of these Acts already noticed. The relation which they establish between seller and purchaser in regard to all minerals which may be held to be excepted, appears to me to be, as Lord Westbury said in *Great Western Railway Company* v. *Bennett* (3) clearly defined, useful to the railway company or waterworks undertakers, and at the same time fair and just to the mine-owner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments which might be occasioned to the convenient working of his mineral field by

(1) 1 Shaw Ap. at p. 228. (2) Law Rep. 7 Ch. 699.
(3) Law Rep. 2 H. L. 42.

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his parting with a strip which intersects it. On the other hand those who deprive him of the right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed; but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working, and would in due course be wrought out.

It appears to me that the policy of the Acts in excepting certain minerals from conveyances to compulsory takers of land, favours a liberal and not a limited construction of the reservation to the seller. The difficulty which I have felt in construing their enactments is due to the fact that they do not deal with "minerals" as something which may be different from and additional to "mines." They do not except mines and minerals, but mines of coal, ironstone, slate, and other minerals; that is to say they only except minerals which when worked will constitute "mines" within the meaning of sect. 18 of the Waterworks Clauses Act of 1847, and of the corresponding sections of the Railways Clauses Acts. It therefore becomes necessary to consider what meaning ought in these sections to be attributed to the word "mine?" and also what are the "other minerals," mines of which are specially excepted? The solution of the second of these queries must necessarily be in a great measure dependent upon the answer to be given to the first.

There is a class of cases in the English books which determine that the word "mine" is, according to its primary meaning, significant merely of the method of working by which minerals are got; but that is not its only or necessary meaning. Shortly after the passing of the Act 43 Eliz. c. 2, it was established by a series of decisions, the soundness of which has been often doubted, that occupiers of mines other than coal mines are exempted from the incidence of the poor-rate. That point being settled beyond recall, the Courts gave a restricted meaning to the word "mine," and decided that in the sense of the Act of Elizabeth it must be taken to be a subterranean excavation. It was accordingly held

that persons who worked lead, freestone, limestone, or even clay by means of a shaft and underground levels were not liable to be rated in respect of their occupancy; whilst others who worked the same substances by means of excavations open to the light of day were held to be liable as occupiers of land. I do not suggest that the Courts erred in limiting so far as they could the exemption which for some reason or other had been established; but I may venture to express a doubt whether any such exemption or distinctions with regard to the mode of working would have been recognised if the Act of 1601 had not become law until the year 1847.

I am unable to assent to the appellants' argument that in sect. 18 of the Waterworks Clauses Act, "mines" must be understood in the same sense which it has been held to bear in the statute of Elizabeth. Such may have been its original meaning, but it appears to me to be beyond question that for a very long period that has ceased to be its exclusive meaning, and that the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out. It does not occur to me that an open excavation of auriferous quartz would be generally described as a gold quarry; I think most people would naturally call it a gold mine. The whole frame of sect. 18 indicates in my opinion that the legislature intended it to include minerals got by open working, as well as minerals got by what has been termed mining proper. The clause excepts mines of slate and also of "other minerals"—an expression which must, at the least, include rock strata of the same homogeneous character, and generally worked or capable of being worked by the same methods as slate.

The fact is of sufficient notoriety to be noticed here, that, although in the extreme south-west of the island slate is obtained by subterraneous workings, the reverse is the rule in North Wales and in Scotland, where it is quarried. The word "quarry" is, no doubt, inapplicable to underground excavations; but the word "mining" may without impropriety be used to denote some quarries. Dr. Johnson defines a quarry to be a stone mine. In

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framing sect. 18 and the corresponding railway clauses, the legislature plainly intended that waterworks undertakers and railway companies should at the time when they take land by compulsion, pay full compensation for, and become at once proprietors of all surface and other strata which are not excepted. To adopt in these clauses the same construction of "mines" which has been followed for the purposes of the English poor-rate would, in my opinion, lead to consequences which the legislature cannot have contemplated. In that case, the extent to which minerals in the lands were sold or excepted at the date of the conveyance would depend upon the mode, underground or open cast, by which they might be found, at some future and far distant time, to be workable, or upon the method according to which the landowner might then choose to work them. These factors being indeterminate, it would be well nigh impossible at the date of the purchase to arrive at a fair estimate of the compensation payable for it. I cannot conceive that the legislature in using the expression "mines of slate," meant to distinguish between the different methods of getting it, and to enact that slate which may never be disturbed, shall be taken and paid for at once, if it would naturally be quarried, but shall not be taken and paid for until it is actually worked, if it would naturally be got by means of an underground level. It was certainly within the contemplation of the legislature that water or railway works may rest upon excepted minerals; because it is expressly provided that the undertakers or the company are to be entitled to such parts of these minerals as require to be excavated for the purpose of constructing their works. When a railway company or water undertakers excavate in order to obtain a foundation for their works there is no roof to the excepted minerals; and it is difficult to understand how, in these circumstances, they could be got by proper mining.

I am accordingly of opinion that, in these enactments, the word "mines" must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for waterworks or railway purposes, the undertakers or the company acquire, in my opinion, no right save the right to use that

part of the surface; they acquire no right to the minerals themselves except in so far as these are dug out or excavated, in order to construct their works. The important question still remains, what are the minerals referred to, other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be ejusdem generis with any of those enumerated. Slate being one of them I do not think it would be possible to exclude freestone or limestone strata. I may add that, so far as I can see, it is possible that there may be some strata, which would pass to the compulsory purchaser, if they lay on the surface, but may possibly be reserved to the seller, if they occur at some depth below it. But I desire to say that, in the view which I take of the present case, it is not necessary to determine any of these points.

The enactments in question describe the excepted mines of minerals, as lying under the land compulsorily acquired; and they appear to me to contemplate that the purchasers, as soon as they obtain a conveyance, shall become the owners of "the land." That expression, as it occurs in these enactments, obviously refers to surface; and the question therefore arises, what, in ordinary acceptation, is understood to be the surface crust of the earth which overlies its mineral strata? It is, of course, conceded that vegetable mould, which commonly forms a large ingredient of the topmost layer of the crust, is not within the exception; but it is also the fact that, in many districts, the cultivable soil is mainly composed of clay, which is a mineral, in this sense, that it is an inorganic substance. I have come to the conclusion that the expression "the land" cannot be restricted to vegetable mould or to cultivated clay: but that it naturally includes, and must be held to include, the upper soil including the subsoil, whether it be clay, sand, or gravel; and that the exceptional depth of the subsoil, whilst it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals.

I am accordingly of opinion that the interlocutor of the First Division of the Court of Session ought to be reversed, and that of the Lord Ordinary restored.

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LORD HERSCHELL :—

My Lords, I have the misfortune to differ from the rest of your Lordships, who heard the arguments in this case. I confess that my mind has wavered much as to the proper conclusion to be arrived at, and I need hardly say that I have the less confidence in my opinion when I find it differs from those which your Lordships entertain.

The point for decision in this case is a simple one, and may be shortly stated, but to my mind it is one of very considerable difficulty. The appellants in 1871 purchased a piece of land, for the sum of £11,000, from a predecessor in title of the respondent for the purpose of constructing works authorized by the Glasgow Corporation Waterworks Act, 1866, and have constructed their works upon it. The disposition to the appellants contained a reservation in favour of the sellers of "the whole coal and other minerals in the said lands in terms of the Waterworks Clauses Act, 1847."

The Act just named, which is incorporated with the appellants' private Act, under which the land was purchased, provides (sect. 18) "that the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

I may observe here that I cannot accede to the view that the present case is to be dealt with as if the "coal and other minerals" had been reserved to the respondent by the operation of the disposition alone without regard to the statutory provision I have quoted. It appears to me that whatever the statute excluded from the purchase was excluded in the present case, and that the issue between the parties depends entirely upon the construction to be put upon the statute in relation to the circumstances before us. Within and under the lands purchased, and the adjoining lands, there is a seam of clay which the respondent

had been for some time working in the adjoining lands, and in March, 1885, he intimated that he was desirous of working it under the ground acquired by the pursuers, and called upon them to state whether they would avail themselves of their right to prevent his working the seam by making them compensation therefor in terms of the Waterworks Clauses Act, 1847. Hence the present action, the appellants insisting that the clay was included in their purchase, and that the respondent had no title to it.

In the 4th condescendence it is alleged that the seam of clay lies at an average depth of only two feet below the surface, and that it can be worked only by open workings, which would destroy or endanger the appellants' works. This is not admitted by the answer, which alleges that the clay in the ground adjoining has been wrought open cast, "but previous tirring of the surface is not necessary." I understand this to mean that the clay under the appellants' land could be worked otherwise than from the surface. The answer further states that the seam is of great value. No proof was led, the learned Lord Ordinary being of opinion that it was unnecessary to do so. Upon the allegations I have referred to, the question arises, and I think it is the sole question in the case, whether this seam of clay was reserved within the terms "mines of coal, slate, ironstone, and other minerals," or whether the whole of it lying under the land conveyed, passed by the conveyance.

The real question, then, to be determined is the meaning to be given to the words "mines and other minerals" in construing the Act of 1847. And I doubt whether we are very much assisted by the interpretation which has been put upon the same words appearing in a different collocation or in other instruments or enactments.

Your Lordships were referred to various English authorities for the purpose of shewing that clay had been held in a case (1), in the Court of Appeal to be within a reservation of minerals, and that in other cases a definition of minerals had been adopted sufficiently wide to include it. On the other hand, reliance was placed upon some Scotch authorities, and notably on *Menzies'*

(1) *Hext* v. *Gill*, Law Rep. 7 Ch. 699.

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Case (1), in your Lordships' House, as establishing that in a contract between superior and vassal a reservation of mines and minerals did not comprise freestone, which could only be obtained by quarrying. Lord Mure (2), whose judgment in the Court below was in favour of the appellants, based his opinion upon the ground that though it might be settled by the English authorities that minerals had the extensive meaning contended for, yet it was settled by the Scotch law that in an ordinary contract of conveyance a more restricted interpretation must be adopted, and that there was no reason for construing differently the statutory reservation in question. It is to be observed, however, that the enactment with which we have to deal is intended to be incorporated with all Waterworks Acts, whether in England or Scotland, and that both the Scotch and English Railways Clauses Acts contain similar provisions. When the object and purview of these various statutes is regarded, it is not to be supposed that the legislature intended the same or similar enactments in these various statutes to have a different meaning.

What we have to do, then, is, I think, to look at the purview and intent of the Acts, and to consider what the legislature meant by the language they have employed. It is impossible to peruse the various provisions of the Act we are considering without seeing that the words "mines" and "minerals" are somewhat loosely used. Before proceeding to the interpretation of them, it may be well to inquire what was the object of the legislature in reserving the minerals, and not vesting them in the undertakers of the works authorized by the Acts with which the general Act is incorporated.

This object is, I think, clearly stated by the learned Lords who delivered their opinions in the case of *Bennett* v. *Great Western Railway Company* (3). I think these provisions were inserted for the common advantage of the landowner and the undertakers. He was not to be compelled to sell minerals which were not needed for the purpose of the undertaking, and they were not to be compelled to purchase and pay for minerals which they did not want, which the owner of them might never desire to work,

(1) Shaw, Ap. 225. (2) 14 Court Sess. Cas. 4th Series, at p. 354.
(3) Law Rep. 2 H. L. 27.

and as to which it would be often difficult to determine beforehand whether their working would be likely to affect the waterworks or railway constructed on the surface of the land. I think, therefore, that we should expect to find reserved all minerals under the land of such a nature as are commonly worked, and which possess a value independent of the surface.

I propose first to inquire what meaning ought to be attached to the word "minerals," supposing only the words "coals, slate, ironstone, or other minerals" had been employed without any mention of "mines." I think that the word "minerals" imports, primâ facie, and apart from any context, all substances other than the vegetable matters forming the ordinary surface of the ground. In this widest sense clay is unquestionably a mineral. But we have to look to the context to see whether the word is here used in a more limited sense, and if so, what is the limitation to be put upon it. I think the popular use of the word is often narrower, and that when people talk of minerals they frequently use the word in reference to metals or metalliferous ores. But it is impossible to give this restricted meaning to the word in the enactment we are seeking to construe. Coal and slate are specifically mentioned, and the words "other minerals" cannot be confined to metallic substances. Coal, slate, and ironstone are minerals most dissimilar in their character, and I have sought in vain for any mode of restricting the word "minerals" in this section, whether by confining it to things ejusdem generis with those specified, or otherwise. There is no common genus within which coal, slate, and ironstone can be comprised, except that they are mineral substances of sufficient value to be commonly worked.

But the words which I have hitherto discussed do not, as has been seen, stand alone. The things reserved are "any mines" of coal, slate, ironstone, or other minerals under the land purchased. It appears to me that this limits the reservation to mines of the substances named, and therefore to "mines" of the other minerals included in the general term. What, then, is the interpretation to be put upon the word "mines"? I think the primary idea suggested to the popular mind by the use of the word is an underground working in which minerals are being

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or have been wrought. It is certainly often used in contrast to "quarry," as indicating an underground working as opposed to one open to the surface. But to limit it in the enactment we are construing to an underground cavity, in which minerals are being or have been wrought, would be obviously inadmissible. The enactment was clearly intended to extend to minerals lying underground which had hitherto been undisturbed. Is the true interpretation to be found by limiting the provision to those minerals which are commonly worked by means of underground working? The word "mines" is, I think, in a secondary sense, very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings they are spoken of as iron mines, and so, too, with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term "slate quarry" is undoubtedly sometimes made use of, though the workings are underground. I think it is impossible to obtain any assistance from this use of the word "mines" in construing sect. 18. It is no doubt exceptional to obtain coal and iron except by underground workings; but this is not so with slate, and the word "mines" is used alike in reference to all these substances.

I thought for some time that the language used must be construed as applying only to those seams or strata of the specified and other minerals which were capable of being wrought by underground workings. It seems to me that there is much to be said for that view, but after reflection I do not feel that it affords a safe basis for decision, nor is it clear that it would assist the appellants. It must be remembered—and I think this has an important bearing on the view adopted by the learned Lord Ordinary—that it is part of the scheme of the statute that the undertakers do not purchase any right to the support of the underlying strata of minerals. No one has doubted that if they refuse to purchase the reserved minerals, whatever is really within the reservation may be got, even though the result be to cause a serious subsidence and even dislocation of the surface. In this respect the case differs from an ordinary reservation in a

deed unaffected by statutory provisions. In such a case the owner of the reserved minerals can only work such portion of them as can be removed without causing disturbance of the surface, or if he remove more he must provide some substituted means of support. Therefore when it is suggested that the reservation in question embraces only such mineral seams as are capable of being worked underground, that cannot mean such as are capable of being so worked without disturbing the surface.

Once this conclusion is arrived at, it is difficult to see any firm basis for a distinction between seams which lie at a considerable depth below the surface, the removal of which would be likely to affect it little, and those which lying near it could not be got without very seriously affecting it. What valid distinction could be drawn between a seam of coal or ironstone a hundred yards beneath the surface, and one which came within two feet of it? And if the latter would be within the reservation, how can a seam of clay similarly situated be excluded? I have said that it is not clear that the proposed interpretation of the section would be of any advantage to the appellants. For proof not having been led I cannot assume that the clay might not be got otherwise than by surface operations by working on from the adjoining land, though of course its removal would cause subsidence, and great disintegration of the surface. I own I have entertained very grave doubts as to the proper conclusion to be arrived it, but I do not see my way to differ from the judgment of the Court below. I think the reservation must be taken to extend to all such bodies of mineral substances, lying together in seams, beds or strata, as are commonly worked for profit, and have a value independent of the surface of the land.

I desire to guard myself against being supposed to decide more than I do. The pursuers in this action seek to interdict the defender altogether from working the clay under their land in any manner whatsoever. All that in my opinion arises for decision is whether they are entitled to do so. I say this, because it was contended before us that inasmuch as the statute authorizes the use of such part of the minerals as may be necessary for the pursuers' works, and the bed of clay forms the

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bottom and sides of their reservoir, the defender cannot be entitled to take away this clay. But this point, which is well worthy of consideration, does not appear to me to be raised at the present time. I therefore forbear from expressing any opinion upon it or (assuming it to be well founded) upon the further question how much of the clay can be considered as having been used for the purpose of the waterworks, and therefore as having become the property of the appellants. I think the interlocutor appealed from ought to be affirmed.

LORD MACNAGHTEN :—

My Lords, your Lordships are called upon to determine the meaning of the word "mines" in the 18th section of the Waterworks Clauses Consolidation Act, 1847. That section is the first and the most important section in a group of clauses collected under the heading, "With respect to Mines." Corresponding provisions are to be found in the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845.

The argument before your Lordships proceeded on the ground that so far as the present question is concerned the three Acts must be construed alike, and that in regard to mines under or near lands purchased for the purpose of the undertaking railways are in precisely the same position as waterworks. The case, therefore, is one of considerable importance. But the question lies in a narrow compass, and must, I think, depend for its solution on an examination of the sections in the Waterworks Act which bear upon the subject, with the aid of such light as may be derived from parallel passages in the Railway Acts.

Sect. 18 of the Waterworks Clauses Act, 1847 (corresponding with sect. 77 of the English Railways Act and sect. 70 of the Scotch Act), is in the following terms. [His Lordship read it.] (1)

The exception in favour of the vendor comprehends, it will be observed, mines of all sorts—mines of coal, ironstone, and slate, and mines of other minerals—but nothing else. Taking the words in their ordinary signification, and in their grammatical

(1) See Lord Herschell's opinion, ante, p. 680.

construction, the exception does not extend to minerals other than minerals of which mines are composed. This seems clear from the latter part of the section, where the expression "such mines" refers to and sums up everything covered by the words of description previously used.

On this exception there is engrafted an exception in favour of the undertakers. It is one of very limited extent. But it throws, I think, considerable light on the meaning of the word "mines." It excepts "only such parts" of the mines under the lands purchased "as shall be necessary to be dug or carried away, or used in the construction of the works."

Now the meaning of the word "mines" is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral it means little more than veins or seams or strata of that mineral. But however the word may be used, when we speak of mines in this country, there is always some reference more or less direct to undergound working.

In *Darvill* v. *Roper* (1), and again in *Bell* v. *Wilson* (2), Kindersley, V.C., had to consider the meaning of the term "mines." In the latter case he asks the question, "What is a mine?" and he answers it thus: "I cannot entertain the smallest doubt that a mine and a quarry are not the same. It would, perhaps, require some labour to define precisely what each is, but we know this, that a mine, properly speaking, is that mode of working for minerals by diving under the earth, and then working horizontally or laterally; whereas a quarry is when the working is sub dio. There is not the slightest doubt in my mind as to the difference between them." The case of *Bell* v. *Wilson* (2) was taken to the Court of Appeal. In his judgment on the appeal Turner, L.J., asks the same question, and after referring to dictionaries answers it in much the same way. As regards that part of the case he expressed his entire concurrence with the Vice-Chancellor. It was admitted that there is no reported case

(1) 3 Dr. 294. (2) Law Rep. 1 Ch. at p. 308.

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which throws any doubt on the accuracy of the language used by the Vice-Chancellor in defining or describing a mine. If one wanted a recent authority to confirm the Vice-Chancellor and to emphasize the ordinary meaning of the word "mines" one could not, I think, do better than turn to the judgment of Kay, J., in *Midland Railway Company* v. *Haunchwood* (1). In describing the case before him the learned judge says: "The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this, except at one point where it crops out, *but it is in no sense a mine, being got entirely by open workings.*"

Dealing, therefore, with sect. 18 alone, there seems to be no reason for giving the word "mines" a strained or unnatural meaning. It has, indeed, been suggested that the mention of slate tends to shew that the word "mines" is used in a loose way without reference to any particular mode of working, because slate is usually got by open working. But, as everybody knows, there are places where slate is worked underground. The Act excepts mines of slate; it is silent as regards slate quarries. The more natural inference would be that slate mines are excepted, and that slate quarries are not. Especially as the Railways Clauses Acts make mention of slate quarries in another group of sections. It has also been suggested that the exception in favour of the undertakers points to minerals near the surface, and therefore to minerals which may be got by quarrying. But it seems to me that there is little force in this suggestion. The exception rather tells the other way. In constructing railways and waterworks, in deep cuttings, in tunnelling, or in sinking wells, it is at least possible that minerals contained in mines may be met with. On such an event occurring, were it not for the exception, the operations of the undertakers or of the company might be brought to a standstill. And so the Act gives them as included in their purchase such parts of the mines, or, in other words, so much of the minerals contained therein as they are obliged to interfere with in the construction of their works. But it gives them nothing more. How strictly railway

(1) 20 Ch. D. at p. 560.

companies are tied down when their powers are limited by reference to what is "necessary" is shewn by the decisions on sect. 16 of the English Act as to the diversion of roads and rivers: see *Reg.* v. *Wycombe Railway Company* (1); *Pugh* v. *Golden Valley Railway Company* (2). The rights of the undertakers or of the company are limited by the necessity of the case. They are not at liberty to interfere with mines or to use the minerals contained therein merely because it may be a convenience or a saving of expense to do so. If the intention of Parliament had been to reserve to the vendor under the exception of "mines" all minerals of every description however they might be worked, and therefore such things as clay, stone, and gravel, which are ordinary materials for constructing or repairing the works, one would have expected to find the undertakers and the company authorized to use not merely such parts of the "mines" as might be necessary, but such parts as might be useful or proper for constructing their works; and, on the other hand, required to pay for what might be so used, and to work under the direction or inspection of the mine-owner or his surveyor.

So far there seems to be no difficulty. The difficulty, such as it is, is created by the sections which follow, and which regulate the rights of owners of mineral property (if I may be allowed to use that expression as a neutral term) lying under or near the lands of the undertakers or the company. In these sections we find the expressions "mines or minerals," "such mines," "such mines or minerals," "such minerals," "parts of mines," "mines, measures, or strata," all applied to the mineral property within the scope of the enactment.

Now the word "minerals" undoubtedly may have a wider meaning than the word "mines." In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the reported cases it seems to be laid down, or assumed, that to be a mineral a thing must be of commercial value, or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral

(1) Law Rep. 2 Q. B. 310. (2) 15 Ch. D. 330.

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when it cannot be worked at a profit. Be that as it may, it has been laid down that the word "minerals" when used in a legal document, or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. It has also been held that the use of the word "mines" in conjunction with "minerals" does not of itself limit the meaning of the latter word. At the same time, it cannot be disputed that the term "minerals" is not unfrequently used in a narrower sense, and one, perhaps, etymologically more correct, as denoting the contents or products of mines. Nor indeed are the authorities all one way in preferring the wider meaning of the word "minerals." For example, in *Church* v. *Inclosure Commissioners* (1) Williams, J., observed, and apparently the rest of the Court agreed, that "minerals in the ordinary sense" meant "minerals which could be worked in the ordinary way underground leaving the surface or crust unaffected."

In dealing with the sections which follow sect. 18 it is to be observed that their scope is not like the scope of sect. 18, and the corresponding sections of the Railway Acts, limited to mineral property lying under the lands purchased, and excepted or deemed to be excepted out of the conveyance. These sections have a much wider bearing. They extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands. They also extend to mineral property within the prescribed distance, although the lands under which it lies do not belong to the undertakers or the company. It would therefore not be enough for the respondent to make out that these sections deal with minerals not contained in mines. He must shew that on the fair reading of these sections the word "mines" includes minerals whether got by mining or not. If that could be established it would go far towards proving that the word "mines" must have that meaning in sect. 18 and in the corresponding sections of the Railway Acts.

It may be conceded that in several places in these later sections the word "mines" is used as comprehending whatever is

(1) 11 C. B. (N.S.) 664, at p. 681.

comprehended by the term "minerals" as therein used. But then comes the question, Is the word "minerals" to have its wider signification, and therefore to enlarge the meaning of the word "mines," or is the word "mines" to control the meaning of the word "minerals"? In the absence of an explanatory context or some indication to be gathered from the nature of the case it has been held that the narrower meaning of the word "minerals" is not to be preferred. Still it is not a strained or unnatural meaning. You are giving a strained and unnatural meaning to the word "mines" if you make it include minerals not got by mining. And, therefore, if the question were which of the two words should yield to the other, there could, I think, be no doubt as to the answer. The more flexible word must give way. You must do as little violence as possible to the language you have to construe.

Apart, however, from this argument, it seems to me that if you look at these enactments carefully, comparing one with the other, you will find enough to shew that the minerals spoken of are minerals that are "parts of mines," or minerals that are "contained in mines." I will illustrate my meaning by one or two instances. The sentence in sect. 78 of the English Act, "if it appear to the company that the working of *such mines* or *minerals* is likely to damage the works of the railway," becomes in the Scotch Act, sect. 71, "if it appear to the company that the working of *such mines, either wholly or partially*, is likely to damage the works of the railway." In the rest of the latter section the two expressions, "parts of mines" and "minerals" are used indifferently as convertible terms. The section proceeds as follows: "And if the company be desirous that *such mines, or any parts thereof*, be left unworked, and if they be willing to make compensation for such *mines or minerals*, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify *the parts of the mines* . . . which they shall desire to be left unworked . . . and in such case such owner, lessee, or occupier shall not work or get *the mines or minerals* comprised in such notice." In the following section (sect. 72 of the Scotch Act) there is a passage which refers to minerals as

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being contained in mines; and the context shews that the minerals so referred to are the only minerals in the contemplation of the framers of the Act. The section begins with the following sentence: "If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier" (that is, the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance), "to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines and minerals for which they shall have agreed to make compensation, in such manner as such owner, lessee, or occupier shall think fit, *for the purpose of getting the minerals contained therein.*" Now, the expression, "the minerals contained therein," must mean "the minerals contained in the mines." So the purpose to which the owner of the minerals and the purpose to which the owner of the mines is limited are one and the same, and the purpose of the owner of the minerals in working is not to get the minerals, using the word in its widest signification, but to get the minerals contained in the mines.

I ought, perhaps, to refer to the passage in which the word "minerals" originally occurs in these sections. It occurs first in sect. 22, where it is provided that "if the owner, lessee, or occupier of any mines or minerals," lying under or near the works, "should be desirous of working the same," he is to give the prescribed notice, and then certain consequences follow. Every subsequent use of the word may be traced to that passage. Now, if the word "minerals" there means minerals whether got by mining or not, the word "mines" is plainly superfluous, whatever meaning be given to it. But if the word "minerals" be restricted to minerals contained in mines, I doubt whether either word is superfluous. The risk to be guarded against, as it seems to me, was the loss of support by the withdrawal of minerals from the mines. The minerals might be worked by the owner, lessee, or occupier of the mines. But they might be worked by persons who could not properly be described as owners, lessees, or even

as occupiers of the mines. They might be worked by persons having merely a license to enter and search for minerals, and a grant of the minerals when obtained. The word "minerals" may have been added out of abundant caution to meet such a case as that, and as being a less awkward expression for the draftman's immediate purpose than the expression, "parts of mines," which occurs in sect. 18. At the same time if the word "minerals," in the sense of "parts of mines," or minerals contained in mines regarded as separate from the chamber which contains them, be deemed superfluous, I would point out that less care seems to have been given to the framing of these sections than to the framing of sect. 18. That section and the corresponding sections of the Railway Acts, mutatis mutandis, are word for word the same. In the sections which follow in each of the three Acts there are changes from the language of the other two, and also variations of expressions in the same Act in many cases where it is impossible to suggest any difference in meaning. These sections seem to have been taken at random from different common forms without any attempt at precision or uniformity of language. In such a composition it is not surprising that a superfluous word should be found. It would be singular that in a short clause like sect. 18 of the Waterworks Act, which exhausts the particular subject dealt with, the leading word should be used in a strained and unfamiliar signification, and that the same peculiarity should be found in all three Acts.

There is no passage in any one of the Acts which requires the wider signification of the word "minerals." On the other hand, the provisions for inspecting mines, both before and during working, and the provisions for the ventilation of the minerals, for making airways and mining communications, all seem to point in the same direction, and to shew that the Acts throughout these clauses are dealing with mines, using the word in its proper and usual signification.

Little or no assistance is to be derived from the rest of the Waterworks Clauses Act. But it may be observed that sect. 12 authorizes the undertakers to dig and break up the soil of the lands which they enter under the powers of their special Act, and "to remove or use all earth, stone, mines, minerals, trees,

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and other things dug or gotten out of the same." The mention of earth and stone in conjunction with minerals seems to shew that these substances were not considered by the framers of the Act to be necessarily comprehended by the term "minerals."

In considering the Railways Clauses Acts it is, I think, worth while to refer to the group of sections prefaced by the heading, "With respect to the temporary occupation of lands near the railway during the construction thereof" (sects. 32 to 43 of the English Act, sects. 27 to 36 of the Scotch Act). These sections empower the company for certain specified purposes to enter upon and use any lands within a distance from the centre of the line not measured by, or necessarily corresponding with, the limits of deviation, and to do so at any time before the expiration of the period limited for the completion of the railway, a period which generally, if not always, extends beyond the duration of the company's powers for the compulsory acquisition of land.

The purposes specified in the Acts include "the purpose of taking earth or soil by side cutting therefrom," and "the purpose of obtaining materials therefrom for the construction or repair of the railway." In exercise of these powers the company is authorized "to dig and take from out of any such lands any clay, stone, gravel, sand, or other thing that may be found therein useful or proper for constructing the railway." Then comes a proviso "that no stone or slate quarry, brickfield, or other like place, which, at the time of the passing of the special Act, shall be commonly worked or used for getting materials therefrom for the purpose of selling or disposing of the same, shall be taken or used by the company."

It is clear, therefore, that in certain cases and for certain purposes a railway company may enter upon lands containing brick earth, and use that brick earth, although the land may not be delineated in the deposited plans, and although the powers of the company to take lands compulsorily may have expired. But while working as temporary occupiers, they are bound (sect. 41) to work in accordance with the directions of the surveyor or agent of the owner of such lands.

Now sect. 42 provides that in all cases where the company

enters upon lands for temporary purposes, the owner may "serve a notice in writing on the company requiring them to purchase the said lands." The company thereupon is "bound to purchase the said lands."

Nothing is said about mines or minerals in this section or in this part of the Act, and, as I have already pointed out, there may be cases when the company is not in a position to serve a counter-notice requiring the owner to sell his mines.

Sect. 43 provides that "where the company shall not be required to purchase such lands," compensation shall be made for their temporary occupation, and that such compensation shall include "the full value of all clay, stone, gravel, sand, and other things taken from such land."

It seems to follow from the consideration of these sections that, where lands taken by the company for temporary purposes are purchased in pursuance of a statutory notice given by the owner, the purchase vests in the company, as part of the property purchased, clay, stone, gravel, sand, and other things of that sort, useful or proper for constructing the railway, although not expressly purchased or expressly named in the conveyance and conveyed thereby, and also that after the purchase the company are free to work as they please, without being subject to the directions of the surveyor or agent of the vendor.

This result, however, seems somewhat incompatible with the view which the respondents take of the meaning of the term "mines" in sect. 77. It must be borne in mind that that section is not confined to lands which the company require to purchase for the purpose of their undertaking. It applies to "any land purchased" by the company, and therefore to lands which the owner requires the company to purchase under sect. 42. If the respondent's view be correct, a railway company which has lawfully entered on lands for the purpose of taking clay or gravel therefrom might find its operations suspended by a notice to purchase those lands. If clay and gravel be comprehended in the term "mines," and if the time for compelling the landowner to sell has passed, the company is helpless. Purchase it must. But the purchase will prevent the lands being used for the only purpose for which they were wanted, unless, indeed, you

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are prepared to do extreme violence to plain language, and to read the provision vesting in the company such parts only of the mines under the lands purchased by them as shall be necessary to be used in the construction of the railway, as vesting in them, to an unlimited extent whatever may be useful or proper for constructing or repairing the railway.

It was urged before your Lordships that the enactments dealing with mines were passed for the benefit of persons authorized to construct waterworks and railways; that, to use Kay, J.'s, language, there was "no reason, therefore, for putting a narrow or restricted construction upon the word 'mines,'" and that, consequently, the word ought to be held to include minerals of every description. I am inclined to think that when you make the word "mines" include that "which is in no sense a mine," you do something more than avoid a narrow and restricted construction. And I am not convinced that it is a proper mode of construing an Act of Parliament to strain the language in favour of those for whose benefit the enactment may be supposed to have been passed.

However that may be, it appears to me that the enactments under consideration were not intended to benefit waterworks or railways at the expense of those whose lands might be required for the purpose of the undertaking. Indeed if Lord Cranworth's suggestion in *Great Western Railway Company* v. *Bennett* (1) be right, the main object of these enactments in their ultimate shape was to prevent the hardships resulting to landowners from the application of common law rights to compulsory purchases. I doubt whether railway companies were special favourites with the legislature in those days. I should rather have supposed that Parliament considered the division of property and the adjustment of rights effected by these enactments a fair arrangement, and one equally beneficial to both parties. And so it is if the language used has its ordinary and proper signification. Confine the enactments to mines, and nothing can be fairer. Where lands containing mines are taken by a railway company it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he

(1) Law Rep. 2 H. L. 27.

would be selling a long narrow strip of minerals, which might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser, it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct waterworks require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. And in many cases they may be worked without interfering with the beneficial enjoyment of the surface.

These considerations, however, do not apply to the case of gravel and clay, and things of that sort, which may be termed surface minerals. Remove surface minerals from under the track, and the railway becomes a heap of rubbish. For the very existence of the line it is necessary that they should be left undisturbed. And yet, according to the respondent's argument, a railway company is not to pay for the use they make of surface minerals which do not belong to them. Why? Because the person to whom they do belong does not actually want his property just yet. In the meantime it is more useful to the railway company than it is to the owner. In other words, to put it plainly, a railway company is to have a forced loan of their neighbour's property without consideration, without any corresponding advantage to him, so long as he may be unable to work it or get it worked at a profit. The doctrine involved seems to me somewhat advanced, and I should hesitate to attribute it to the legislature unless I found it clearly expressed in the Act of Parliament. Observe how unreasonable the proposition is. The surface minerals must either add to the value of the lands at the time of the purchase or not. If they do not add to the value, why is the railway company paying the full value of the lands not to have the surface minerals? They may be useful for the construction of the line; they are necessary for its existence. On the other hand, if they do add to the value of the lands, why is the landowner not to be paid for them at once, though he may not be able for some time to deal with them profitably when they are separated in ownership from the surface? In the case of surface minerals there is no peculiar hardship on the landowner

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in taking a strip of his minerals. The strip taken would not prevent access to his adjoining minerals accessible from the surface and usually got by open working. If the landowner were selling a strip of his lands to an ordinary purchaser he would, in ordinary course, sell the surface minerals too, and so get a better price. When he is made to sell for the benefit of the public, why should he be compelled to sell his property in slices, and to wait for half the price (to take the figures from the present case) until he is in a position to intimidate his purchaser? This seems very unreasonable and very unfair to the landowner, who gets nothing by way of compensation if the Act, as interpreted by the respondent, be honestly carried out. But I must say I much doubt whether the Act so interpreted could be carried out honestly. There is no difficulty in valuing lands on the assumption that they contain no mines. But there would, I think, be considerable difficulty in arriving fairly at the value of lands required for a railway, treating them merely as so much surface, not entitled to any right of support, and as separated for the purpose of valuation from such ordinary constituents of the subsoil as gravel, clay, and stone. If the decision under appeal be upheld, railway companies may no doubt protect themselves in future purchases. But I suspect that in many cases of past sales a railway company would be called upon to pay over again for what it has bought and paid for long ago.

It was said that unless the word "mines" be held to include surface minerals railway companies may be exposed to the risk of having the safety of their works endangered by the removal of clay and gravel, and other surface minerals, in the immediate proximity of their lands. The answer is, that railway companies must judge for themselves what extent of land is required, and take sufficient to ensure the stability of their works against accidents which can readily be foreseen when the nature of the subsoil is known.

I desire to base my judgment on what seems to me to be the plain meaning of the words of the Act; but at the same time it is satisfactory to find that the result is consistent with what may be presumed to have been the intention of Parliament, and not likely to lead to inconvenient consequences.

For these reasons, I am of opinion that the interlocutor under appeal should be reversed.

Interlocutors appealed from reversed; interlocutor of the Lord Ordinary of the 16th of December, 1885, restored; the respondent to pay to the appellants their costs in the Court below and in this House.

Lords' Journals, 10th August, 1888.

Agents for appellants: *Simson, Wakeford & Co., for Campbell & Smith, Edinburgh.*

Agents for respondent: *Grahames, Currey, & Spens, for Hamilton, Kinnear, & Beatson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

THE WESTMINSTER FIRE OFFICE . . APPELLANTS;

AND

THE GLASGOW PROVIDENT INVESTMENT SOCIETY . . . . . RESPONDENTS.

Insurance, Fire—Claim by postponed Bond-holder for Loss after payment of a sufficient Sum to reinstate has been made to prior Bond-holders by other Insurers—Rent of mortgaged Premises—Act 14 *Geo.* 3, *c.* 78, *s.* 83.

The pursuers having a heritable security by bond on certain premises insured them against fire in the defender's office for £900. Prior securities had been given by the owner upon the same premises to other creditors, and those creditors had insured in other offices. The premises having been in part destroyed by fire, the prior incumbrancers recovered from and were paid by the offices in which they were insured an amount sufficient for the re-instatement of the premises, and for the payment of the rent during the period of re-instatement, but the premises were not in fact re-instated. It appeared that immediately before the date of the fire the value of the premises was sufficient to cover the prior bonds and that of the pursuers, but in consequence of the fire the value of the premises was so reduced that they were not sufficient to meet the balance remaining due to the prior creditors, and the pursuers' bond was left entirely uncovered:—

Held, affirming the judgment of the Court of Session (14 Court Sess. Cas. 4th Series, 947) that the pursuers were entitled, notwithstanding the amount paid to the other creditors, to recover to the full extent of their loss.

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But *held*, reversing the judgment of the Court of Session, that the pursuers were not entitled to recover anything in respect of the loss of rent of the premises after they had been damaged by fire.

Semble, *per* The Earl of Selborne and Lord Watson, that 14 Geo. 3, c. 78, s. 83, relating to the application of insurance money on houses destroyed by fire, does not extend to Scotland.

APPEAL from the Second Division of the Court of Session, Scotland (1), giving judgment in favour of the pursuers.

The action was brought by the Glasgow Provident Investment Society, with the concurrence of Messrs. R. H. Hay & Brothers, grain millers, Glasgow, against the Westminster Fire Office, the defenders, upon a policy of fire insurance, dated the 13th of October, 1881.

Messrs. R. H. Hay & Brothers were the proprietors of the Greenhead grain mills, Glasgow, and were in occupation of them as grain millers. They had borrowed large sums of money upon the security of their property and had granted bonds for the amount, and, in conjunction with the various creditors in those bonds, they had from time to time effected policies of insurance over the property with seven different insurance companies, for the aggregate sum of about £9200. These policies were all taken in substantially the same terms in favour of the respective creditors in the bonds, and of the proprietors, Messrs. Hay, in reversion. The pursuers were heritable creditors of the Hays to the extent of about £800, and in October, 1881, they, along with the Hays, insured the mills and their contents for the sum of £900 with the defenders by the policy on which this action was brought. In August, 1882, a fire occurred in the Greenhead grain mills by which the mills and machinery were seriously damaged and the works stopped. At the date of the fire four of the policies above-mentioned were held by two creditors whose claims upon the mills were preferable to the pursuers. The debts due to these two creditors at the date of the fire amounted to about £9000, and the four policies held by them represented insurance to the amount of £7845. The two creditors, with the concurrence of the Hays, raised an action against the offices with

(1) 14 Court Sess. Cas. 4th Series, 947: see also *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Company*, 11 Ibid. 287.

which they were insured for payment of the amount of damage occasioned by the fire, and in that action a decree was pronounced in favour of such creditors for £5668 16*s.* 8*d.*, which (by arbitration) had been ascertained as the amount of the damages. Included in this sum was the rent of the premises for eight months, the time considered necessary for reinstatement. The insurers paid this amount to the two creditors without exercising their option under the policy to reinstate the premises.

Notwithstanding this payment the pursuers raised this action in 1885, concluding for declarator that the defenders were "bound to indemnify the pursuers for the loss sustained by them through the destruction by fire of the premises, machinery," &c. in question, and that the appellants "ought to reinstate the said premises or otherwise to make payment to the respondents of the sum of £565, as the amount of their loss with interest."

The following admissions were made by the parties:—

1. That immediately before the date of the fire the value of the site, buildings, and machinery of the Greenhead grain mills was sufficient to cover not only the prior bonds but also the pursuers' bond.

2. That the value of the site of the said mills, and the salvage thereon of buildings and machinery after the fire, did not exceed, according to the pursuers' valuators, £3500, and, according to the defenders' valuators, £6900, and was not sufficient to meet the bonds prior to that of the pursuers, the prior bonds amounting to over £8600.

3. That the insurable subjects, viz., the buildings and machinery, apart from the site, were never sufficient in value to meet the bonds prior to the pursuers.

On November 10, 1885, the Lord Ordinary (Lord M'Laren) found (1) that the pursuers had sustained damage by fire to the extent of £565, being within the limit of the sum in the policy libelled; (2) that the pursuers had not been indemnified for the said damage, or reinstated in the subjects insured against fire, and that they did not hold the obligation of any other company or person for such indemnification or re-instatement; (3) that the defenders by the policy of insurance had undertaken to indemnify the pursuers against such damage, and it was ordered that the

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defenders do pay the sum of £565 less the £5 already paid, with interest.

On appeal to the Court of Session the judges appointed the case to be argued before the whole Court.

The Lord President (Lord Inglis), the Lord Justice Clerk (Moncreiff), Lords Shand, Craighill, Adam, Lee, Fraser, and Kinnear, were of opinion that the Lord Ordinary's judgment was correct, but they reduced the sum allowed to a total of £350, allowing only £190, the sum insured, in respect of the mill building, £120 for one year's rent, and £40 in respect of three other items—the steam boiler, the smith's shop and furniture store, and the steam-engine and appurtenances. Their Lordships added that Messrs. Hay were not entitled in respect of their consent in this action to any separate or individual decree in their favour.

Against this judgment there was no cross appeal.

The judges in the minority, holding the opinion that the respondents were not entitled to any indemnity, and that the Lord Ordinary's judgment was wrong, were Lords Mure, Young, Rutherfurd, Clark, and Trayner.

In accordance with the finding of the majority an interlocutor dated July 12, 1887, was pronounced (1).

On appeal,

June 25, 26. *Finlay*, Q.C., and *Wood Hill*, for the appellants:—

The judgment of the majority of the Court of Session was wrong. It is admitted that the sum awarded to the first mortgagees in the previous action was ample to reinstate the buildings, and that if it had been so applied it would have increased the value of what was left. However the insurance may be split up or subdivided no more can be recovered in respect of a series of insurances by successive mortgagees than could be recovered if the owner had only insured on behalf of all the mortgagees in their order of priority. In other words, the sum recoverable in respect of damage by fire cannot exceed the amount required for reinstatement of the premises. If a bailee is bound to make good any

(1) 14 Court Sess. Cas. 4th Series, at p. 947.

destruction by fire of goods to the bailor each might call upon his insurers to pay, but the bailor's insurers would be entitled to their remedy against the bailee's insurers for the restoration of the goods, so the whole loss could not be greater than the cost of restoring the goods. In *North British and Mercantile Insurance Company* v. *London, Liverpool, and Globe Company* (1877) (1), Mellish, L.J., said: "Where different persons insure the same property in respect of their different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and, of course, those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of mortgagor and mortgagee. But, wherever that is the case, it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think whenever that is the case, the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation." The respondents have really been awarded compensation under the policy for depreciation in the value of the site which is not insured nor insurable.

(1) 5 Ch. D. at p. 583.

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[EARL OF SELBORNE:—In a certain sense the ground is not insured; but if the buildings are destroyed and the ground is no longer of the value it was before the fire that is due to the loss of the buildings: that is the value which the fire has taken away.]

A person owns two houses covered by one insurance, one only is injured by fire, he cannot in an action on the policy recover compensation for the depreciation in value of the adjoining house.

[LORD WATSON:—Practically I think he could, as the question would be, what damage he had suffered?]

Here, if the policy is really effected for the mortgagor's protection, as considered by Lord Mure, no remedy over is competent in the name of the mortgagee: *Nichols* v. *Scottish Union and National Insurance Company*, in Q. B. D., 18 Dec. 1885 (1). And if there is no assignment competent (2) to the appellants Messrs. Hay are discharged of debts to the amount of £6000, whereas if they had insured solely in their own name all they could have received is the £5668, the cost of re-instatement. The test of the value of the damage is in all cases the cost of re-instatement, and if the question went before a jury they would be directed to give an amount of damages sufficient to re-instate, plus the rent, if the rent was insured. If the judgment stands the respondents will be recovering as on an insurance on the site.

Under sect. 83 of 14 Geo. 3, c. 78, it was entirely at the option of the respondents to require the buildings to be reinstated; and if they neglected that right they have only themselves to blame. That statute was held by Lord Westbury in *Ex parte Gorely* (3) to be of universal application, and not limited to the metropolitan district, and there is no reason, therefore, why it should not apply to Scotland (4).

(1) Reported 14 Court Sess. Cas. 4th Series, 1094.

(2) See *Simpson* v. *Thomson, Burrell, and Others*, 3 App. Cas. 279.

(3) 4 De G. J. & S. 477; 34 L. J. (B.) 1.

(4) The 83rd section of 14 Geo. 3, c. 78, is as follows: "And in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it further enacted by the authority aforesaid, that it shall and may be lawful to and for the respective governors or directors

With regard to the amount awarded to the respondents for loss of rent: The rent is the compensation for the loss of the use of the premises during the rebuilding, but the first mortgagees were in the position of parties who would have the option of being put into possession; and the first and third mortgagees cannot be considered as constructively in occupation concurrently. That part of the judgment is clearly wrong, for the rent of the same building and for the same period cannot be recovered twice over. [They cited on the question of quantum of damages, *Vance* v. *Forster* (1); *Laurent* v. *Chatham Fire Insurance Company* (2); and also cited *Menzies* v. *North British Insurance Company* (3)].

Rigby, Q.C., and *J. Gorell Barnes*, Q.C. (with them *Joseph Hurst*), for the respondents:—

The policy contained a special insurance of one year's rent, subject to the condition that the insurance company shall be only liable for the payment of rent for such portion of one year as the buildings might be untenantable, and the buildings have been untenantable for the full period; and, therefore, the full rent insured is payable. It is payable on another ground, namely, that the third mortgagees, the respondents, had a margin on all

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of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings have been guilty of fraud or of wilfully setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards the rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall within sixty days next after his, or her, or their claim, is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings, are insured that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

(1) Irish Circuit Reports, 1841 to 1843, at p. 50.

(2) 1 Hall, Sup. Ct. New York, 41.

(3) 9 Court Sess. Cas. 2nd Series, 694.

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the property but one item, the value of the rent is completely gone, therefore the respondents are damnified to an extent which is not less than the rent insured, because their security is by so much diminished in value. As the Messrs. Hay were in possession there was no tenant paying the rent assigned in the mortgage deed, but it might have been that the first and second mortgagees would have declined to saddle themselves with the responsibilities of mortgagees in possession, and then the respondents, whose security is the weakest and liable to suffer first, would be bound to go into possession and obtain every penny of the rental value. This point has not been in issue, and the appellants have substantially admitted on the record that the rent—if one-third is deducted—is due; and that admission ought to have some effect as to the costs.

On the general question, the respondents' claim is limited to what is an ordinary claim upon a very ordinary policy, and that policy so long as a debt is due to the respondents is a policy regarding their interests. The policy must be treated as a separate transaction, and the appellants have no right to go into matters which were not in the contemplation of the contracting parties. It has never been decided as an inflexible rule that under no circumstances can the insured recover more than that which is required for reinstatement; and it is entirely at variance with what the Master of the Rolls said in *Castellain* v. *Preston* (1). *Pitman* v. *Universal Marine Insurance Company* (2) decided in the case of a ship that the true test of the amount of damage is not how much it will cost for repairs but how much is the subject depreciated.

It is no answer to the insured, having an insurable interest, to say another has under certain circumstances been paid by some one else. Nor is it open to the insurance company to say to their insured, Your mortgagor can pay, you have lost nothing, and you must first proceed against him. The insurance office who pay the insured mortgagee can stand in the mortgagee's place, and may have a remedy over against other persons which in ordinary circumstances would be a sufficient recoupment; but it may turn out owing to some circumstances, of which the

(1) 1883. 11 Q. B. D. 380, at p. 386. (2) 9 Q. B. D. 192.

parties were not aware at the time, that such an assignation avails them nothing, and that they may have to pay more than the amount of the damage by fire.

The 14 Geo. 3, c. 78, is not applicable, and certainly does not apply to Scotland. The appellants relied on Lord Westbury in *Ex parte Gorely* (1); but see the somewhat similar case of *Simpson* v. *Scottish Union Insurance Company* (2), where the Vice-Chancellor pointedly abstained from deciding that the statute was general. Besides, sect. 83 points to the fact that the person who may move in the matter must have some claim on the insurance money about to be paid.

[EARL OF SELBORNE:—This Act is speaking in 1774, and sect. 86 says, "And in such case may plead the general issue." Could that apply on that date to Scotland?

LORD WATSON:—It would have been utterly unintelligible and incapable of application.]

Vernon v. *Smith* (3) is against the view of Lord Westbury. See also *Richards* v. *Easto* (4); *Rayner* v. *Preston* (5). This point has also been raised here for the first time, and no question as to the statute appears on the pleadings.

Finlay, Q.C., in reply:—

That sect. 86 contains a provision which may not have been applicable to Scotland at the date of the Act is no reason for not applying sect. 83. The respondents suggest on the concluding words of the 83rd section that the only persons who can intervene are those who can claim the insurance money. That is not so; the right is given upon the request of any person interested "or entitled to any house," and the respondents, as third mortgagees, had an interest in the buildings here and an interest in having them reinstated; and that being so, they have themselves only to blame if they have sustained any damage from the reinstatement not taking place.

Time having been taken,

(1) 4 De G. J. & S. at p. 480.
(2) 1 H. & M. 618, at pp. 628, 629.
(3) 1821. 5 B. & Ald. 1, at p. 5.
(4) 15 M. & W. 244.
(5) 14 Ch. D. 297; 18 Ch. D. 1.

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LORD HALSBURY, L.C.:—I wish to ask whether the parties are disposed to accept the judgment of two of their Lordships who have heard the case. The House is unanimous, but one of the noble and learned Lords who has prepared an opinion upon the case (Earl of Selborne) is not able personally to be present here.

Wood Hill, for the appellants, and *Joseph Hurst*, for the respondents, stated the parties were content to have the judgment in that way.

LORD HALSBURY, L.C.:—

My Lords, this action was founded on a contract contained in a policy of fire insurance dated the 10th of October, 1881. One of the terms of that contract was that if the property or any part thereof should be destroyed or damaged by fire the appellants agreed that they would make good the loss to an amount not exceeding £900. The owners of the property insured were Messrs. Hay, grain millers, of Glasgow. The respondents held heritable securities on the property to an extent not exceeding £900. Other contracts of insurances had been made by other creditors of Messrs. Hay, the proprietors of the mills. These other creditors also held heritable securities prior to those of the present respondents.

By the joint minute of admissions it was agreed between the parties that immediately before the date of the fire the value of the subjects insured was sufficient to cover both the prior bonds and that of the respondents. As a consequence of the fire the value of the buildings is now so reduced that the respondents' bond is entirely uncovered. It appears to me to be beyond doubt that by the contract of indemnity into which the appellants entered with the respondents the contingency has arisen against which the appellants contracted to indemnify the respondents.

It is difficult to state the argument on the other side, since it seems to me to be founded partly upon an error of law and partly upon a suggestion of fact which seeks to get behind the admission by which the parties are concluded. The error of

law I think is in the suggestion that a creditor had not an insurable interest in the property of his debtor upon which property the debtor has given him a heritable security. I should have thought it was too well settled a proposition in insurance law to be susceptible of argument that a creditor under these circumstances is entitled to insure. The error in fact appears to be founded upon the suggestion, more implied than expressed, that more was insured upon the subjects of insurance than their value justified, since if the property before the fire was good security for the value of the bonds, and is now only good as represented by the insurance paid in respect of it to satisfy the bonds prior to that of the respondents, it is difficult to see that when all these contracts were made, the subject being sufficient to satisfy them and the fire alone having made the difference, yet the respondents are not to be indemnified to the extent of their loss.

I am wholly unable to understand how other contracts made with other people can affect the question once it is conceded that the property as it originally stood was sufficiently valuable to meet the demands of all. But it is said that apart from the sums of money received by the prior creditors, and by which they have extinguished the debt which gave them an insurable interest in the premises, they might, or some of them might, have insisted on the re-instatement of the premises. It seems to me that such a proposition would be as reasonable an answer to the respondents' demand as to suggest that if the premises had not been burned down there would have been no loss; and I agree if the premises had been re-instated there would have been no loss; but as a fact they were not; and, apart from the argument derived from the statute 14 Geo. 3, c. 78, s. 83, the respondents had no control over the question whether the premises should be re-instated or not; and no term in the contract to which they were parties gave them an option whether the premises should or should not be re-instated. With respect to that statute, I will only say that no such question is suggested upon the record, and inasmuch as there are some questions of fact which would have to be determined before one could affirm the application of that statute, I decline to consider it.

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As to the rent, I am of opinion that there was no loss in respect of it. The £120 awarded by the Inner House in respect of the rent seems to me not to be maintainable. Messrs. Hay themselves occupied the premises. This was an occupation to which the respondents could not under the circumstances have been entitled, and the loss, if it can be called a loss, to the actual occupiers, has been paid to the persons entitled to it. It is not a loss to the respondents, who never had it and could not be entitled to it.

I am therefore of opinion that the judgment must be reduced by the sum of £120. It does not appear to me that that alteration of the amount substantially affects the question as to who has been successful in the litigation, and I therefore think that the appellants ought to pay the costs both here and below, and I move your Lordships accordingly.

My Lords, I am not entitled to read to the House as a judgment the opinion of the noble and learned Earl (the Earl of Selborne) who was present during the argument in this case, but as a part of my opinion I am entitled to read it to your Lordships, and I propose to do so. What follows is that which the noble and learned Earl would have said if he had been here.

OPINION OF THE EARL OF SELBORNE.

The questions to be decided on this appeal are two: first, whether the respondents are entitled to recover at all against the appellants; and, secondly, whether they are entitled to recover for loss of rent.

If the respondents have suffered any loss by the destruction of the insured buildings which were destroyed by fire, it follows necessarily that they are entitled to recover, to the extent of that loss, in this action. If they have suffered no such loss, they are, of course, not entitled to any indemnity. The case, therefore, of the appellants upon the first question depends upon the contention (difficult in the face of the admissions upon the record) that the respondents have suffered no such loss.

The respondents were insured in the appellants' office for £900, by a policy dated in 1881, on which the premiums were duly paid. The subjects insured against fire consisted of the

Greenhead grain mills and machinery (at Glasgow), belonging to Messrs. Hay Brothers, who had given the respondents a heritable security by bond on those premises, for the sum of £1000, of which £917 11*s.* 6*d.* remained due when the fire occurred. The amount of that insurance was apportioned over different parts of the subjects insured, of which the barley-mill and counting-house were damaged to the full amount at which they were insured, viz. £190, and damage, estimated at £40, was also done to parts of the machinery, insured to a greater amount. Under the judgment of the Inner House, now appealed from, the respondents have recovered these two sums (making together £230) and also £120, for one year's rent of the barley-mill and counting-house; in all £350.

There were prior securities, also given by Messrs. Hay Brothers to other creditors, upon the same premises, and those other creditors had insured in other offices. All the securities, including that of the respondents, covered the ground or site on which the mills stood, which (being a subject indestructible by fire) was not insured, either by the respondents or by the prior incumbrancers.

It was admitted between the parties that "immediately before the date of the fire the value of the site, buildings, and machinery of the Greenhead grain mills was sufficient to cover, not only the prior bonds, but also the pursuers' bond." The interest, therefore, of the respondents at the time of the fire was more than equal to the amount which they have recovered in this action. It was also admitted that "the value of the site of the mills, and the salvage thereon of buildings and machinery after the fire, was not sufficient to meet the bonds prior to that of the pursuers." The pursuers, therefore, have actually lost by the fire the whole amount of that interest in respect of which they were insured; and they have, primâ facie, a clear right, to the extent to which that loss is covered by their contract with the appellants, to be indemnified. I reject (as in my judgment fallacious) the argument, that part of the loss ought to be ascribed to depreciation in value of the site or ground on which the barley-mill and counting-house stood, or of other parts of the site of the mill premises. The site remains, at whatever may have been its

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value apart from and independent of the buildings which stood upon it. Any greater value which it had when the buildings which have been destroyed stood upon it was entirely due to those buildings; and, as they were insured, and have been destroyed by fire, the contract of indemnity covers, in my opinion, the whole of that difference, less salvage only.

What, then, is the ground on which the respondents' claim to indemnity is now resisted? Simply this: that the prior incumbrancers have recovered from, and have been paid by, the other offices in which they were insured (under contracts to which neither the appellants nor the respondents were parties or privies), £5500; being (subject to certain reserved questions affecting a sum of £168 16*s.* 8*d.* with which the respondents are in no way concerned) the amount which had been awarded by the witness McKinnell (oversman in a reference between the prior bondholders and those offices) as sufficient for the reinstatement of the premises. But the premises were not, in fact, re-instated. The whole amount so awarded went into the pockets of the prior incumbrancers. If it had been applied in re-instating the premises, the respondents would, no doubt, have had the benefit of the re-instatement; and the appellants might then have been entitled to say that they had suffered no loss. But it was not so applied, and the respondents derived no actual benefit from the payment to the prior incumbrancers; because although the debt due to those incumbrancers was (so far) reduced, the balance still remaining due to them was more than sufficient to exhaust the whole remaining value of the property included in their securities.

It is, nevertheless, insisted, that the payment so made, by strangers to the contract on which this action was brought, to other strangers with whom the respondents had nothing to do, was, not as between those parties only, but also as against the present respondents, the full and absolute measure of the respondents' interest, and of the whole loss for which any number of insurance companies could possibly be answerable, by way of indemnity, to any number of persons, under any contracts whatever, in respect of this fire; and that, this having been paid to the prior incumbrancers, and having been insufficient (by more than

the amount now in question) to discharge their debt, the whole interest of the respondents in the subject-matter of the action was thereby extinguished. Why should this be so? As between themselves and the prior incumbrancers, it was the right of the other insurance companies to satisfy their contracts of indemnity by re-instating the premises which the fire had destroyed, or (which amounts to the same thing) to pay those prior incumbrancers the amount necessary and sufficient for that purpose. This they have done. The claims of the prior incumbrancers on their insurances were in that way satisfied; and it is, in my judgment, immaterial, as between the present parties, that they might have been entitled under their securities to receive and retain more, if more had been recoverable under their policies. But if the amount of the actual loss by the fire, with which alone the respondents are concerned (as the premises have not been re-instated, and the appellants have not offered to re-instate them), is greater than the amount which would have been sufficient to reinstate them, and which the prior incumbrancers have accepted, why should this latter amount be treated as the measure of the loss, as between these parties? Nothing less than some statutory, or other binding authority, could establish in the appellants' favour a false and arbitrary measure of the actual loss. No such authority, applicable in these circumstances, and as between these parties, was cited to your Lordships. The sum necessary to re-instate is one thing; the loss, if there be no re-instatement (which is the present case), is another. On this point the evidence of the witnesses Livingston and Thomson (on pages 18 and 20 of the record) is demonstrative, and, in my judgment, conclusive.

It was further contended, that the respondents, under a certain statute (14 Geo. 3, c. 78, s. 83), might have intervened before the settlement between the other insurance companies and the prior incumbrancers, and might have required the money, which was, in fact, paid to those prior incumbrancers, to be applied in re-instating the premises. I am by no means sure that they could; assuming (as for this purpose I do assume) that the section of the statute relied upon is operative beyond the bills of mortality (see *Ex parte Gorely* (1)), and that the Scottish

(1) 4 De G. J. & S. 477.

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Courts, in which no similar question has yet been raised, would hold it to be applicable to Scotland. It has not, as far as I know, ever been decided that it applies as between mortgagor and mortgagee, or (which is the same thing in effect) as between prior and puisne incumbrancers. The concluding words of the section are sufficient, at least, to suggest grave doubts whether it ought to be so applied. But I do not think it necessary for your Lordships to decide that point; because no question upon that statute has been raised in the pleadings between these parties, as (in my judgment) it ought to have been, if anything was to be founded upon it. There is nothing to shew that the appellants knew that they had the right which the statute is supposed to have given them, much less that they were bound, as between themselves and the appellants, to put it in force. It is not even shewn that they knew what other insurances there were, or that they could, practically, have intervened before the settlement between the other insurance companies and the prior incumbrancers was completed. Certainly, it does not appear that they were ever called upon by the appellants to exercise that supposed right; and, if they were not, the appellants ought not, in my opinion, to be heard to complain that it was not done, So far, therefore, as my judgment is concerned, nothing turns, in this case upon the statute 14 Geo. 3, c. 78.

The question of rent remains: and, as to this, I think the respondents fail, and that the sum awarded to them by the Inner House ought to be reduced by £120. The mills were, in fact, occupied by the mortgagors, Messrs. Hay, and not by any tenant paying rent. Taking the £120 as representing one year's value of their occupation to Messrs. Hay (who were joint insurers), the occupation rent could only be lost to the persons entitled to receive it; and, when paid to or settled with them, it could not be lost over again to any other person. The rent of the barley-mill and counting-house destroyed by the fire was included in the securities of the prior incumbrancers; it was also insured by them; they, according to their priority, and not the respondents who stood behind them, were entitled, if they thought fit, to claim it, or the insurance-money payable for its loss. In the settlement between them and the offices in which they were insured they

actually did so, and it was allowed to them for eight months, the period which the oversman thought it would have taken to restore the property and to put the mill in full working order. This could only be on the principle of treating them as, through their mortgagors, virtually in possession or in receipt of rents and profits;—the mortgagors, as joint insurers, were parties to that settlement. I am unable to see how, consistently with this, there could be another actual loss of the same rent to the respondents, or even of rent for those four months of the year during which it was treated as not lost to those prior incumbrancers. I think, therefore, that the amount recovered in the action ought to be reduced to £230.

I do not, however, think that the determination of this point in the appellants' favour ought to make any difference as to costs. Considering the position of the parties, and the nature of the larger question raised by the appeal, my opinion is that all the costs, here and below, ought to be paid by the appellants.

LORD WATSON:—

My Lords, I have had the opportunity of considering in print the opinion of the noble and learned Earl (the Earl of Selborne), and I concur in it.

The reasoning of the learned judges who constituted the minority of the Court of Session depends upon two propositions which are, in my opinion, equally fallacious. One of these is, that separate fire policies, covering the same subjects, effected without privity by independent incumbrancers, for the protection of their several interests, must all be treated as if they had been effected by the owner of the subjects, if he is made a party to each policy in respect of his right of reversion only, and undertakes to pay the premiums of insurance. The other is, that payment to a first incumbrancer of a sum which does not represent the difference between the insurable value of the subjects and their value after deterioration by fire, but is sufficient to re-instate them, must necessarily be regarded as full indemnity to a postponed incumbrancer, in any question with his own insurers, although the sum so paid is pocketed by the assured and is not expended on re-instatement.

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Lord Watson.

The Act 14 Geo. 3, c. 78, s. 83, was not pleaded in the court below, and it is not referred to in the appellants' case, although it was founded on in the argument addressed to your Lordships. Having regard to the preamble of the statute, and to the general scope of its provisions, it humbly appears to me that if a question were to arise as to its applicability within the realm of England, beyond the bills of mortality, the decision in *Ex parte Gorely* (1) would require to be carefully considered. In my opinion, the Act was not intended by the legislature to have any application to Scotland. It was passed in order to amend previous legislation which had no reference to that country, and the whole tenor of its enactments, and the remedies which these provide, appear to me to indicate that they were not meant to be administered by Scotch Courts.

I am also of opinion that the respondents have failed to shew that they had an insurable interest in the rent of the subjects embraced in their security; but I agree with the Lord Chancellor that their failure upon that subordinate point ought not to prejudice their right to the costs of this appeal.

Ordered, that the interlocutor of the Lord Ordinary in Scotland, of the 10*th of November,* 1885, *as varied by the interlocutor of the Lords of Session of the Second Division, of the* 12*th of July* 1887, *except so far as the last-mentioned interlocutor is varied by this Order, be, and the same is hereby affirmed: That the interlocutor of the Lords of Session of the* 12*th of July,* 1887, *be varied by deducting the sum of* £120 *from the amount found due by the said interlocutor from the defenders to the pursuers: That, subject to this variation, the said interlocutor be, and the same is hereby affirmed: That the said petition and appeal be, and the same is hereby dismissed this House: That the said cause be, and the same is hereby remitted to the Court of Session in Scotland, to do therein as shall be just and consistent*

(1) 4 De G. J. & S. 477.

with this variation and judgment: And that the appellants do pay or cause to be paid to the respondents the costs incurred in respect of the said appeal to this House.

Lords' Journals, 10th August, 1888.

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Agents for appellants: *Dawes & Sons, for Kidstons, Watson, Turnbull, & Co., Glasgow*, and *H. B. & F. J. Dewar, W.S., Edinburgh.*

Agents for respondents: *Lindo & Co., for Macbride, Davidson, M'Arthur, & Stevens, Writers, Glasgow*, and *Smith & Mason, S.S.C. Edinburgh.*

[HOUSE OF LORDS.]

HUNTER AND OTHERS . . . . . APPELLANTS;

AND

THE NORTHERN MARINE INSURANCE COMPANY, LIMITED, AND OTHERS . . } RESPONDENTS.

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Insurance (Marine)—Meaning of "in Port"—Fairway of navigable Channel.

A ship insured for a voyage to any port of discharge in the United Kingdom, "and whilst in port during thirty days after arrival," arrived at Greenock, discharged her cargo, and was placed in a dock for repairs. Within thirty days after her arrival she left the dock in ballast for the port of Glasgow, in tow of a steam-tug, to proceed on a new voyage, and had reached the fairway of the channel of the Clyde, her stern being about 500 feet distant from the harbour works, when she was capsized by a sudden gust of wind, and sustained damage:—

Held, affirming the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 544), that the ship at the time of the accident was not "in port" within the meaning of the policy, and that the underwriters were not liable.

The Sailing Ship "Garston" Company v. *Hickie* (15 Q. B. D. 580) discussed.

APPEAL from the First Division of the Court of Session, Scotland, which gave judgment in favour of the defenders.

The pursuers were the owners of the ship "*Afton*," and the defenders were the underwriters of three policies of insurance on the vessel.

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The main question was whether the place where the vessel was damaged was within the limits of the port of Greenock, according to the proper construction of the policies. The policies were on the cargo, hull, and materials of the ship, "at and from port or ports $\frac{\text{and}}{\text{or}}$ place or places in any order in Java, to any port or ports of call $\frac{\text{and}}{\text{or}}$ discharge in the United Kingdom, or France, or United States, and while in port during thirty days after arrival, including all risks of docking while in dock, and undocking, and shifting docks, as might be required at any time during the currency of the policy." The ship in the course of a voyage covered by the policies arrived at Greenock on January 22, 1885, where she was berthed in the Victoria Harbour, and discharged her cargo. On February 6 following she left the Victoria Dock, and went to Caird's Dock, or shipbuilding yard, for repairs. That dock or shipbuilding yard is private property, although situate between two of the Greenock docks. The repairs having been executed, she came out of Caird's Dock, in ballast, on February 12, being towed by a steam-tug. While being so towed, on February 12, and when she was measuring, from her stern, about 500 feet distant from the harbour works, in the fairway of the navigable channel of the Clyde, she was struck by a gust of wind, which caused her to capsize and drift on to the sand-bank opposite to the entrance to the harbour of Greenock. The damage amounted to £5890 16*s.* 3*d.* The place where she capsized was in the fairway of the Clyde, through which all vessels passing up and down from the estuary of the Clyde to Glasgow were navigated, whether they call at Greenock or not. The average width of the channel here was about 1000 feet. The vessel was on her way to Glasgow, to be loaded with a cargo of coals for Brisbane, and was insured by other underwriters, not parties to this case, from the time when the policies here in question were at an end.

On February 19, 1886, the pursuers commenced this action against the defenders, the Northern Marine Insurance Company, the grantors of the first policy, and the underwriters of the other two policies, concluding for payment of their proportion of the damage.

A proof was allowed, the evidence being directed to the

question what were the limits of the port of Greenock. The facts which appeared from the proof are fully considered in the opinions of Lord Herschell and Lord Watson, and it is not considered necessary to state them further.

The Lord Ordinary (Lord Trayner), by interlocutor dated October 29, 1886, assoilzied the defenders from the conclusions of the summons, being of opinion (*a*) that the place of accident was not in the port of Greenock, and (*b*) that assuming that place was within the port, that the vessel, having left the Victoria Harbour to go into Caird's Dock, had left "the port" of Greenock, in the sense these words were used in the policies, and was not, therefore, covered by them at the date of the accident.

The First Division (Lord Shand dissenting) adhered to the Lord Ordinary's judgment as regards the first ground (1).

Lord Shand was of opinion that the place where the vessel was injured was in the port of Greenock, in the commercial and natural sense of the term, and that the accident having happened in the port, the risk had not ended on the vessel leaving Caird's Dock on her voyage to Glasgow: and that it would be adding a new term to the policy to hold that the risk terminated as soon as the vessel was unloosed and started from the dock to go to Glasgow, though she was still sailing in the port of Greenock. The pursuers appealed.

On appeal,

1888. March 8, 9, 12, 13, 15, 16. *Finlay*, Q.C., and *J. Gorell Barnes*, Q.C., for the appellants:—

The appellants contend that the expanse of water where the accident happened is within the port of Greenock; it possesses all the characteristics of a port in the popular business and maritime sense; and the evidence of the witnesses, the meaning of the charters and statutes relative to the port of Greenock, and the acts of the port authorities for very many years, all fulfil the tests laid down by Brett, M.R., in *The Sailing Ship "Garston"* v. *Hickie* (2). Here, for a very long time, loading and unloading was carried on at the Tail of the Bank—the west end of the sand-

(1) 14 Ct. Sess. Cas. 4th Series, 544. (2) 15 Q. B. D., at pp. 589, 590.

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bank. And disuse of that practice, owing to the harbour works having been made more commodious, and the increase of traffic up the river requiring the fairway to be kept clear, cannot be held to contract the limits of the boundary of the port.

Then, from 1772 to 1864 the corporation of Greenock charged anchorage, bay, and river dues, and although these dues were sometimes resisted, in most cases they were paid, and yielded a considerable revenue, for which, as far as Glasgow ships were concerned, the Greenock corporation received compensation under the Pier and Harbour Order Confirmation Act, 1864; again, the right of dredging; and the making bye-laws as to mooring vessels in the roads, &c., were also rights exercised.

The Lord Ordinary was of opinion that when the vessel went into Caird's Dock the risk ceased; but graving docks, as a matter of law, are part of the appliances of a port, and therefore covered by the words "in port:" *Phillips* v. *Barber* (1); *Devaux* v. *J'Anson* (2). The respondents are driven to the contention that the word "port" of Greenock, used in the Greenock Port and Harbour Act, 1866, sect. 44, is confined to the existing works of the harbour trustees, but that would infer that a vessel passing from one dock to another to complete her loading necessarily leaves the port because she must go outside the harbour to do so; but that would apply to almost every river port in the United Kingdom.

Sir *R. E. Webster*, A.G., and *R. T. Reid*, Q.C., for the respondents:—

There is no evidence of any ancient port, either by grant, prescription, or charter, or that the port of Greenock extended to the particular place where the vessel was damaged. So far as the navigable channel of the Clyde is concerned, the charter of 1636 in favour of the city of Glasgow shews that the whole franchise of the river to a point below Greenock was given to Glasgow.

The power given to the Greenock authorities to build a port and harbour by various charters and Acts since 1705 did not apply to the fairway of the river, but was rigorously confined to the artificial works erected or acquired by the harbour trustees.

(1) 5 B. & Ald. 161. (2) 5 Bing. N. C. 519.

And the Act of 1866 clearly distinguishes between the port and harbour on the one hand, and the stream and Tail of the Bank on the other, and treats the latter as outside the port and harbour. The charter of 1816, giving the sand-bank to the town of Greenock for a particular purpose, recites the history of the place, but there is no mention of anything not covered by the works and harbour. The anchorage dues were frequently disputed, and in 1864 they were given up as against Glasgow ships, and no charge has been made against any one since 1867, when the town's rights were purchased by the harbour trustees. The case of *The Sailing Ship "Garston" Company* v. *Hickie* (1) decided that there must be a defined geographical area, and the place must also be known as a port. If, however, it ceases to be a port, then the onus is on the appellants to shew that a usage and practice still exists of treating it as a port.

[LORD WATSON:—A port may consist of an open roadstead, where vessels load and unload or lighten: *Sea Insurance Company of Scotland* v. *Gavin* (2).]

Dredging or placing of buoys in the channel is no evidence of that place being within the port; as these things were done under statutory authority. The same observation applies to customs, lighthouses, and police.

[LORD HALSBURY, L.C., referred to *Brown* v. *Tierney* (3).]

The respondents' case is that a vessel which has been in a discharging dock, and has gone into a private dock, and then breaks ground on a new voyage, is not in port within the meaning of these policies. Nor could it have been the intention of the parties to the policies here, that the vessel was to be covered at the time when she was actually starting on a passage up a

(1) 15 Q. B. D. 580.

(2) In this House in 1830, 4 W. & S. 17; 5 Court Sess. Cas. 1st Series (2nd ed.) p. 494. There held, that a policy of insurance "at and from Leith to Shetland, and from thence to Barcelona, and at and from thence and two other ports in Spain to a port in Great Britain, &c., covered a total loss which happened while the ship insured lay in the roadstead of Saloe, although there were no artificial works or other usual protection for loading and unloading, but the place was resorted to by vessels for trade, and it was treated as a port by the Spanish and British Governments: see Arnould's Marine Insurance, 6th ed. p. 460.

(3) 1 Taunt. 517.

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dangerous navigable channel to a new voyage not included in the policies sued on. No doubt the case would be different if the insured vessel was passing from one loading place to another in the port, as in *Gambles and Others* v. *Ocean Marine Insurance Company of Bombay* (1), but that is not this case.

Finlay, Q.C., in reply, cited *Haughton and Others* v. *Empire Marine Insurance Company* (2); *Mercantile Marine Insurance* v. *Titherington* (3).

Judgment after consideration.

LORD HALSBURY, L.C.:—

My Lords, the question whether the barque *Afton*, insured under a policy while she was in port, suffered a misfortune which entitled her owners to recover against the underwriters depends, first, upon the construction to be given to the word "port," and, secondly, when the meaning of that word has been ascertained, upon the question of fact whether the accident is proved to have happened within the limits contemplated by the contract. The word "port" is undoubtedly ambiguous, but dealing with a policy of insurance I have no doubt that what is meant by the word "port" is what Lord Esher in *Sailing Ship 'Garston' Company* v. *Hickie* (4) describes as what shippers of goods, charterers of vessels, and shipowners would mean by a port, that is to say, that a legal port might be according to the general understanding of the classes of persons described by Lord Esher, either restricted or enlarged by mercantile usage. There are, however, some well recognised elements which, I think, according to any usage one would expect to find. I do not know that those ordinary elements are anywhere more concisely set forth than in the Treatise ascribed to Sir Matthew Hale (5): "A *port* is an haven and somewhat more. 1st. It is a place for arriving and unlading of ships or vessels. 2nd. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shewn. 3rd. It hath a ville, or city, or borough, that is the caput portus, for the

(1) Law Rep. 1 Ex. D. 8, 141.
(2) Law Rep. 1 Ex. 206.
(3) 5 B. & S. 765; 34 L. J. (Q.B.) 11.
(4) 15 Q. B. D. at p. 588.
(5) Hargraves Law Tracts, 46.

receipt of mariners and merchants, and the securing and vending of their goods, and victualling their ships. So that a port is quid aggregatum, consisting of somewhat that is natural, viz., an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lye, and a good shore where they may well unlade; something that is artificial, as keys, and wharfs, and cranes, and warehouses, and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., jus applicandi, jus mercati, and divers other additaments given to it by civil authority."

It is very common that where a port so defined is in question, no such difficulty as arises here interferes with the determination of the question of fact. The arrival of a vessel at a particular place, and the mercantile usage applicable to such a place, solves the problem without much real difficulty. What the Master of the Rolls said in the case already quoted suggests what are the proper tests to apply where the question arises whether the vessel has or has not arrived at the port at which she is to deliver her cargo. To quote the language of the noble Lord in *Sailing Ship "Garston" Company* v. *Hickie* (1): "Now what will such a port be? What do you go to a port for? Because you want either to load or to unload goods. Every one who understands ships knows that you cannot conveniently load or unload goods in a place where the ship itself would be in danger. Therefore all people possessed of common sense, instead of taking their boats on to a beach on an open sea, where they might be knocked to pieces in a storm, go to what they call a port, which is always a sheltered place. It is a place of safety for the ship and the goods, whilst the goods are being loaded or unloaded. There will never be a port, in the ordinary business sense of the word, unless there is some element of safety in it for the ship and goods. Now what will constitute a port as regards the loading and unloading of goods, and the safety of the ship during the process? What will be more certain to be a port in the sense of all persons concerned in the use of it, than a natural port? That is, a place in which the conformation of the land with regard to the sea is such that, if you get your ship within certain limits, she is in a

(1) 15 Q. B. D. at p. 588.

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place of safety for loading and unloading." But the difficulty in this case arises that there are, so to speak, rival ports along the course of the Clyde, and it is essential for the pursuers to establish that the *Afton* was capsized and stranded within the limits of the port of Greenock. Now I entirely agree with Lord Shand that the port as fixed by statute for fiscal purposes has no relation to the question now in debate. The port of Cardiff, for instance, extends for sixty miles for Customs purposes, and within that sixty miles are comprehended several other ports perfectly well known and recognised as different and independent ports in the commercial sense, although comprehended within the ambit enacted for Customs purposes. I also agree with Lord Shand that the test applied by one of the witnesses, namely, "that the port must be where a ship can legally call upon a consignee of cargo to take delivery," is obviously unsound. I also agree that the argument derived from the Act of Parliament of 1866 is inconclusive, and I should follow the learned judge's reasoning that it is impossible to suppose that that statute has changed the meaning of the term "port of Greenock," as that term was previously understood in its natural and ordinary commercial sense by business men in making their contracts of charter or insurance. Now the place where the *Afton* stranded is about a quarter of a mile from the shore of Greenock, and the question whether or not it was within or without the limits of the port of Greenock is a pure question of fact. I think there was some evidence which unexplained might have induced me to come to the conclusion that it was. The reception of port dues, the loading or unloading of vessels bound to the port are the natural and appropriate sources of proof; but the element of doubt which exists in this case arises, as I have pointed out before, from the fact that the accident happened in a land-locked waterway, as to which it may be said that the evidence is as applicable in some respects to Glasgow as to Greenock. The place called the Tail of the Bank has been used by vessels consigned to other ports, and it was common for vessels to anchor when it was intended to lighten them of part of their burden, and the goods so lightered and the vessels so lightened have proceeded to ports other than Greenock. The only class of evidence which has made me hesitate has been

the exaction by the Greenock authorities of dues from vessels anchoring at places which, if those dues had been lawfully exacted, would be almost conclusive to shew that the locus in quo was within the limits of the port of Greenock, but the weight of that evidence has in my judgment been so reduced by proof of successful resistance to those dues that I am unable to differ from the Lord Ordinary and the majority of the learned judges who concurred with him in the conclusion at which they arrived, that the locus in quo is not proved to have been within the limits of the port of Greenock. My Lords, I doubt whether the history of the port throws any light upon the question under debate. Both in Scotland and in England the right to erect a port is part of the royal prerogative. No port can exist except under the authority of the Sovereign, and if the question were the legal existence of such a port as Greenock the historical evidence would be conclusive; but it does not appear to me to touch the question of the limits of the port thus proved to exist.

For these reasons I am of opinion that it is not established that the "locus in quo" was within the limits of the port of Greenock. The Lord Ordinary decided the case in favour of the defenders, and expressed an opinion that the taking of the vessel into Caird's Dock, or the starting on her voyage, even if within the limits of the port of Greenock at the time of the happening of the accident, would have put an end to the risk. In the view I take of the risk, it is not necessary to decide these points, but I wish to guard myself against being supposed to concur in either of these views.

I move your Lordships that the interlocutor appealed from be affirmed, and this appeal be dismissed with costs.

LORD HERSCHELL:—

My Lords, the circumstances which have given rise to this appeal may be very shortly stated.

The appellants' barque *Afton* was insured by an ordinary marine policy "at and from port or ports in Java, to any ports of call or discharge in the United Kingdom, or France, or the United States, and while in port during thirty days after arrival." She arrived at Greenock, to which port she had been ordered, on

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the 22nd of January, 1885, and discharged her cargo in the Victoria Harbour. On the completion of her discharge on the 6th of February, she went into Caird's Dry Dock for repairs. These were finished on the 12th of February, and on the same day she was taken in tow in order to proceed to Glasgow to load a cargo of coals for Brisbane. She had reached a point about 500 feet distant from the artificial works of the harbour, when she was struck by a squall of wind, capsized, and drifted on to a sandbank opposite the Custom House Quay. The disaster happened within thirty days after the vessel's arrival at Greenock, and the question is whether it occurred whilst she was "in port."

I agree with the view which has been more than once expressed by learned judges, that in construing such a contract as that with which we are dealing the word "port" must be taken to have been used in its popular or commercial sense, that is to say, as applying to what would be understood as the port by shippers, shipowners, and underwriters. Where there is a common understanding among such persons as to the limits of a port, the matter is free from difficulty. Here the appellants attempted to prove such a common understanding. The learned Lord Ordinary came to the conclusion that they had not succeeded in doing so, and after carefully considering the evidence I see no reason to differ from him. In the absence of any such common understanding, how is the question to be determined? It appears to me that you must then consider what are commonly understood to be the characteristics of a port, and what are in general the tests for determining its limits, and apply the conclusions arrived at to the particular case. A port is a place where a vessel can lie in a position of more or less shelter from the elements, with a view to the loading or discharge of cargo. The natural configuration of the land is, therefore, often a most important element in determining what are the limits of a port. All the waters within given boundaries which possess the common character of safety and protection would be generally admitted to be within its ambit. Where, however, a port is one of several, situate on the same river, it is obvious that the natural configuration of the land is not of the same importance, and does not afford the same guidance.

I have carefully examined the plans before your Lordships in the present case, but do not find myself led by them to the conclusion that the disaster to the *Afton* occurred within the port of Greenock, or assisted in fixing the boundaries of that port. Under these circumstances, I think we must have recourse to the history of the port, and its user, and must ascertain what is the area which has served the purposes of a port. The port of Greenock is of comparatively recent origin, and the charter which created it is in existence. But I think that the inquiry what has de facto been used as the port, is of even greater importance than an investigation of the limits constituted by the original grant.

By a charter bearing date the 11th of July, 1670, Charles II. granted to John Schaw, of Greenock, the lands and barony of Greenock, comprising the lands of Wester Greenock and other lands with the ground within the ebbing and flowing of the sea lying contiguous to the said lands. By the same charter he granted full power to the said John Schaw "to repair and build free ports, harbouries, and havening places upon any pairt of the ground of the said lands, and gave, granted, and disponed the Haill privilege and liberty of free ports, harbouries, and havening places, pertaining to any other port, harbourie, or havening place in this kingdom, and haill petty customs, shoare silver, anchorage, assize boles, and other dewties whatsoever of the said ports or havening places." I think there can be little doubt that this was the origin of the port of Greenock; the language used points to that, and no evidence has been adduced of its existence at an earlier date.

It appears that in the year 1705 Sir John Schaw raised a fund of money by voluntary subscriptions of the inhabitants of Greenock "for building the harbour there situated on a small beginning," and that a voluntary tax was afterwards imposed by the inhabitants for the same purpose. In the 24th year of George II. an Act was passed which, after reciting that the superior of the town of Greenock, with the inhabitants thereof, began to raise money about 1705 by voluntary subscriptions for building a harbour there, gave authority to levy a tax for the repair of of the harbour. In or about 1772, by an instrument which recited that the family

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of Greenock, who were the only lawful proprietors of the harbour, had been in use of exacting certain small taxes called anchorage dues from the ships and other vessels frequenting the said harbour, the administrators and town council of Greenock acquired these rights from John Shaw Stewart, and a feu contract was afterwards entered into between them, by which he alienated to the magistrates and town council "all and whole the harbour of Greenock, and piers and quays of the same, which had been built and reclaimed from the sea after A.D. 1700, comprehending and containing" eight acres, with the anchorage, shore, bay, and ring dues to be paid by all the ships or vessels entering the harbour of Greenock, or any other harbour or harbours within certain limits, with power to the magistrates and town council to move forward and enlarge the harbour and to erect other harbours.

I pause here to observe that it appears to me impossible to infer from the terms of the charter, or the instruments founded upon it, that the port has the wide limits contended for by the appellants.

In 1773 an Act became law, entitled an Act for deepening, cleaning, and making more commodious the harbour of the town of Greenock. Several other Acts were passed relating to the harbour or port of Greenock between that date and 1866, when the consolidating and amending Act now in force was enacted.

Both sides have placed reliance upon this legislation. The appellants contend that it recognises the existence of a port extending beyond the artificial works and across the fairway of the river. The respondents deny this, and assert on the contrary that the statutes define the limits of the port, and shew that it does not extend beyond the artificial works and the waters immediately adjacent to them. I do not propose to enter upon a critical examination of the language of these statutes; for I am not disposed to place the same reliance upon them in determining this case as some of the learned judges did in the courts below. Even if it were quite clear that the statutes defined the port in the limited sense contended for, it would not, to my mind, be conclusive of the question with which we are dealing. Such definitions are often inserted merely for the purpose of the Act,

in which they are found, determining the boundaries within which the regulations or obligations of the statute are to operate. I will only say this, that I can find nothing in this legislation to indicate that the port of Greenock was known or understood to have the extensive limits contended for.

I have already pointed out that, in my judgment, the more important inquiry is what has been used as the port. For if an area outside the charter or statutory limit has in fact served as part of the port, I think it must be held for the present purpose to have these more extended limits.

Before proceeding to this inquiry, I may observe that I cannot attach any weight to the argument derived from the charter of 1816, by which the sandbank opposite Greenock was granted to the town council for the purpose of building dykes upon it for the protection of the bay and harbour. I think it is consistent with either view.

It was, no doubt, at one time the practice for vessels to anchor near the bank opposite Greenock, principally at the west end, which is known as the Tail of the Bank, and there discharge a part of their cargoes, or occasionally the whole. This practice continued until a few years ago. The appellants lay great stress upon this circumstance, and maintain that these anchorage places were within the port of Greenock. If Greenock had in all cases been the destination of the vessels so anchoring, and of the cargoes discharged from them, I should have felt the weight of this contention, for it would have been cogent evidence that the whole of the fairway opposite Greenock across to the bank had been treated and used as a part of the port. But in point of fact many, I believe most, of the vessels which came to anchor in the neighbourhood of the bank were bound to Glasgow and other places on the river, and the part of the cargo there discharged was taken to these destinations. It appears to me that there is no more reason, derived from the practice of anchoring and discharging near the bank, for asserting that the waters so used formed part of the port of Greenock, than there is for alleging that they were a part of any other of the ports to which the vessels were bound, or to which the goods discharged from them were lightered.

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The appellants also urged strongly that their contention was supported by the fact that anchorage dues were received by the Greenock authorities in respect of vessels which came to anchor in the neighbourhood of the bank. If these dues had been uniformly paid by vessels so anchoring, one would unquestionably have endeavoured to find a legal origin for payments thus exacted and submitted to. And it may be that the conclusion that the anchoring ground was within the port of Greenock would have been the best explanation that could be arrived at, whatever difficulty might be interposed by the terms of the charter which created the port. But it is clear from the evidence led by the appellants that though many, and even the majority of the vessels, yielded to the claim and made the payments, yet during the entire period over which the evidence extends payment was at times refused, not only in the case of vessels going to Glasgow, but also of vessels destined for Greenock. And when payment was so refused it was never insisted on by the local authorities, nor did they ever assert their right in a court of law. It is common knowledge that where it is sought to establish a right by evidence of its exercise, a few instances in which the claim of right has been resisted and not insisted upon, outweigh a multitude of cases in which it has been yielded to. I think it is impossible to draw any conclusion favourable to the appellants from the evidence as to the exaction of anchorage dues. It produces upon my mind the impression of a usurpation and encroachment rather than of the existence of a right which could have been established, if brought to the test of legal proceedings.

The conclusion, then, to which I am led is, that there is nothing either in the nature of the locality, or in the documentary history of the port, or in the evidence as to the way in which it has been used, to shew that its boundaries extended to the place where the *Afton* was capsized.

The learned counsel for the appellants insisted that if the contention of the respondents were supported, a vessel going from one dock to another could not be said to be "in port." I do not think this follows. A vessel using in this manner, and for this purpose, the waters adjacent to the artificial works might well be said to be within the port without compelling the conclusion that

it extended to the locus in question. All that I decide is that the appellants have not discharged themselves of the burthen of proving that the place where the disaster occurred was within the port of Greenock.

It becomes unnecessary, owing to the conclusion at which I have arrived, to express an opinion upon the other question argued at the bar. Inasmuch as the *Afton* had broken ground on a new voyage at the time of the disaster, it was urged that even if within the ambit of the port when this occurred she was not "in port" within the meaning of the policy. It was admitted by the appellants that the words "while in port" must receive some limiting construction, and that, if the vessel had proceeded, say to Ayr, and then returned to Greenock, and been lost whilst in that port, and within the thirty days, the loss would not have been covered by the policy. Inasmuch as the *Afton* at the time in question would have been covered by a policy "from" Greenock, even though within the limits of the port, it is certainly open to serious consideration whether she can properly be said to have been damaged "while in port" within the meaning of the instrument sued on.

I am of opinion that the interlocutor appealed from ought to be affirmed, and I concur in the motion which my noble and learned friend on the woolsack has proposed.

LORD WATSON:—

My Lords, the barque *Afton*, of Ayr, arrived at Greenock from Java, on the 22nd of January, 1885, and discharged her cargo in the Victoria Harbour. On the 6th of February the vessel was taken for repairs into a shipbuilder's private dock within the ambit of the harbour works; and on the 12th of the month she left that dock in ballast for the port of Glasgow, in tow of a tug-steamer, when she was capsized by a sudden gust of wind, and sustained serious damage. At the time when the accident occurred the stern of the *Afton* had reached a point in the waterway of the Clyde 500 feet, or thereby, outside the harbour works of Greenock.

The *Afton* was covered by three policies of insurance for a voyage from Java to any port of discharge in the United King-

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dom, "and whilst in port for thirty days after arrival;" and the present action was brought by her owners, the appellants, against the underwriters, who are respondents, for the costs of raising and repairing the vessel. The Lord Ordinary (Trayner) assoilzied the respondents, being of opinion that the locus of the accident was not within the port of Greenock, and that the vessel had left the port within the meaning of the policies on the 6th of February, when she went into a private dock for repairs. The First Division of the Court (Lord Shand dissenting) affirmed the interlocutor of the Lord Ordinary upon the first of these grounds, without disposing of the second. Lord Shand was of opinion that the Lord Ordinary was wrong upon both points, and that the appellants were entitled to decree.

The harbour works of Greenock are constructed on the south shore of the river Clyde, and consist of a series of quays or breastworks abutting on the river, with inner docks or basins, the majority of which are tidal. The estuary of the Clyde, ex adverso of these works, is of considerable width; but the navigable channel is contracted by a sandbank on its north side, which extends all the way from the eastern to a point not far from the western extremity of the harbour works. The distance from the front of the works to the edge of the bank averages about 1000 feet, and at the place where the *Afton* capsized is about 800 feet; so that the vessel had crossed the medium filum of the waterway. At the west end of the sandbank, to the north of the waterway proper, there is a roadstead known as the Tail of the Bank, which is chiefly used as an anchorage by foreign-going vessels passing up and down the river, on their way to and from Greenock or Glasgow and the intermediate ports, of which there are several. It is customary for inward-bound ships of large burden, whilst anchored there, to lessen their draught of water by discharging part of their cargo, which is conveyed in lighters, sometimes to Greenock, and sometimes to Glasgow. It is also customary for outward-bound ships to moor at the Tail of the Bank for the purpose of taking on board their stores and the complement of their crew.

According to the appellants' argument, the port of Greenock comprehends what they represent as the bay of Greenock, being

a large area of water ex adverso of the south shore, between Garvit Point on the east and Whitefarland Point on the west, extending so far northwards as to include the whole navigable channel used by vessels passing up and down the river, as well as the tail of the bank. The case submitted for the respondents is that the port of Greenock is confined to the artificial harbour-works, and to such part of the river as may be necessary for, and is actually used by, vessels moored alongside the piers or quays. A great mass of evidence, oral and documentary, has been adduced in support of either view.

It was not disputed that what is popularly or commercially understood to be the port of Greenock must be taken to be the port for the purposes of this case. I doubt whether it would be expedient, and I do not think it is necessary, to attempt any definition of the various circumstances or indiciæ which will be sufficient to give to a particular piece of water the character of a port, in a popular or commercial sense. In many instances its natural or artificial features of themselves go a long way to indicate what must be popularly taken to be the limits of a port; but the case of the *Sea Insurance Company* v. *Gavin* (1), decided by this House in 1830, shews that an open and exposed roadstead may be a port within the meaning of a marine policy. I think it was rightly held in *Sailing Ship Garston Company* v. *Hickie* (2), that in ascertaining its popular limits, no aid can be derived from statutory definitions of a port for fiscal purposes. That is obviously true in the present case, because the port of Greenock, as defined by Treasury warrant, in pursuance of the Customs Consolidation Act, 1853, includes the greater part of the Firth of Clyde, and all seaports on the mainland, or in the Hebrides, from Ardnamurchan Point to Loch West Tarbet. The boundaries of the burgh of Greenock, as fixed for police purposes by a series of municipal Acts, appear to me to be equally beside the present question. In my opinion, the most important consideration, in all cases like the present, must be, whether the area in dispute has or has not been used and treated as an integral part of the port by vessels frequenting it, as well as by the port authorities.

(1) 4 W. & S. 17.

(2) 15 Q. B. D. 580.

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I do not think the oral evidence, which chiefly consists of conflicting opinions, derived from facts otherwise proved, throws much, if any, light upon the controversy between the parties. Upon the whole evidence I have come to the conclusion that both Courts below were right in holding that the place where the *Afton* met with her mishap, on the 12th of February, 1885, is not within the limits of the port and harbour of Greenock.

The contour of the south shore between Garvit Point and Whitefarland Point does not indicate the existence of anything like a bay inclosed by two headlands, although the phrase "bay of Greenock," does occur in some of the documents produced. A straight line drawn between these points would include but a small portion of the area claimed as a bay by the appellants. Immediately, or at a very short distance, outside the face of the harbour-works there is the navigable channel, of inconsiderable width, which is in constant use by shipping of all sorts and sizes, passing and repassing between Glasgow or other places on the Clyde and home or foreign ports. The Tail of the Bank is not used for these purposes, and affords a safe harbourage for vessels of large size; but there are no physical features to indicate that it is more intimately connected with Greenock than with other ports on the river.

According to the law of Scotland, the right of erecting and holding public ports and harbours is vested in the Sovereign, and neither communities nor individuals can possess that right without a grant from the Crown, or the authority of Parliament. In some instances the Crown has given a right of free port, with the privilege of levying dues, over a large area of water, as in the case of the royal burgh of Campbeltown, whose grant expressly includes the whole loch or bay: see *Magistrates of Campbeltown* v. *Galbreath* (1). The port of Greenock was the subject of a grant from the Crown in 1670 to Sir John Schaw, the owner of the lands and barony of Greenock, and superior of the burgh, which conferred upon him and his successors power "to repair and build free ports, harbouries, and havening places upon any part of the ground of the said lands," with all rights and privileges pertaining to other free ports, including such shore silver,

(1) 7 Court Sess. Cas. 2nd Series, 220.

anchorage and other duties as these were in use to levy. The charter expressly confines the grant to the foreshore of the barony, and to artificial works upon it; and gives the grantee no right of port in the bay of Greenock or in the navigable waters of the Clyde.

It appears from the municipal records of Glasgow in 1693 and 1696 that two ports had then been established on the foreshore of the barony, the one at the burgh of Greenock, and the other at Cartsdyke between the burgh and Garvit Point. These were, in all probability, mere landing-places upon the open beach, ports which Sir Thomas Craig (De feudis, 1, 16, 12) describes as places "in quibus naves appellunt;" but in the year 1705 Sir John Schaw raised a sum of money, by subscription from the inhabitants of the burgh "for building the harbour there situated on a small beginning." The subscription proved to be insufficient for the completion of the works contemplated, and in 1751 a local Act was passed, authorizing a tax upon all ale or beer sold within the burgh, to be paid to the magistrates and council, who were appointed trustees for cleaning, excavating, building and repairing the harbour and piers. In 1772 the then proprietor of the barony disponed in feu to the magistrates and council, "all and whole the harbours of Greenock, and piers and quays of the same, which have been all built and gained off the sea since the year 1700, consisting of and comprehending eight acres, three roods, and ten falls, conform to a plan signed by him of this date, with the anchorages, shore, bay, and ring dues payable by all kinds of ships or vessels coming into the harbour of Greenock, or into any other harbours that may be built betwixt the west side of the Kirk burn and the east side of the Royal Closs in Greenock." It is clear that the feu charter of 1772 which transferred the harbour to the burgh conveyed nothing except the artificial works defined by plan and measurement and confined the right of exacting dues to vessels entering or using these works or any additions which might be made to them. Having regard to the terms of his own title it is equally clear that the superior made over to his feuars all the dues which he himself had a legal right to exact.

The fact may be noticed here that in the year 1816 the magis-

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trates and town council upon an application to His Majesty's Barons of Exchequer in Scotland obtained a charter of gift from the Crown of the sandbank already mentioned, with the professed object of building dykes upon it, for the protection of the bay and harbour from the east and north winds, and for making it otherwise useful, without destroying or injuring the navigation of the river. I cannot understand what assistance the appellants derive from the terms of that deed. In the petition to the Barons of Exchequer which the charter narrates, the sandbank is not described as lying in or bounding the port of Greenock (which is now the appellants' contention) but as situated in the estuary of the Clyde, and in the dispositive clause of the charter it is described as "opposite to the harbour of Greenock." Thus far the evidence does not suggest that the port of Greenock extends beyond the limits of the artificial works, and so much contiguous water-space as may be requisite for the accommodation of vessels which use them. I do not say that, in Scotland, the limits of a trading port, as understood by persons engaged in commerce, must of necessity be co-extensive with the original grant from the Crown. They may be extended by parliamentary recognition, or by the usage of the port; but it appears to me that the terms of the legal grant are an element of some importance in considering the history of the port, and its present commercial limits.

Since their acquisition by the municipality in 1772, the harbour works have been greatly enlarged and improved, in virtue of powers conferred by a succession of local Acts, commencing in 1773, and ending in 1882. Under these Acts the port and harbours have, for a very long period, been vested in a body of statutory trustees, who constitute the port authority for Greenock. They levy statutory rates, which are exigible solely in respect of the use of the artificial harbour works, and are applicable to the maintenance, repair and extension of these works. At the time when the harbour was transferred to trustees, the magistrates and council retained all rights which they had to levy anchorage, shore, bay and ring dues; and these, or at least anchorage dues were, until recently, collected by the Harbour Trust, along with their statutory rates, and paid into the common good of the burgh.

The subjects vested in the port authority by these statutes are the port and harbours of Greenock; and their enactments do not appear to me, when closely examined, to contain any recognition by the legislature of the waterway of the Clyde or of the Tail of the Bank, as forming a part of the port. The more recent statutes are decidedly unfavourable to that view. They limit the powers and jurisdiction of the trustees to the artificial works and harbours, and the entrances to the latter; and the Act of 1866, which is now the leading statute, expressly distinguishes the port and harbours from the stream of the river and Tail of the Bank, in terms which, taken by themselves, plainly indicate that neither of these places is within the ambit of the statutory port. It must, of course, be kept in view that the main object of these statutes was to provide for the maintenance and enlargement of the artificial works; and their provisions are, therefore, not necessarily conclusive as to the limits of the commercial port. It is sufficient, for the purposes of the present case, to say that these enactments lend no support to the appellants' case.

The duty of erecting and maintaining lighthouses and beacons, removing wrecks and other obstructions, of licensing pilots, and of making and enforcing regulations for the navigation of the River and Firth of Clyde, including that part of the river which is ex adverso of the Greenock harbours, belongs exclusively to a statutory board, known as the Lighthouse Board. The costs incurred by the board in the execution of their Acts are defrayed by special rates, which they are empowered to levy from all vessels which navigate the waters under their jurisdiction. They have also the duty of deepening and dredging the navigable channel at the expense of the rates, but, so far as concerns that part of the channel which is opposite to Greenock Harbour, it is provided that the dredging shall be performed by the Greenock Harbour Trustees, either at their own instigation, after due notice to the board, or upon the requisition of the board, and, in the case of difference of opinion, as to the work necessary to be executed, the sheriff-depute of the county is authorized to decide between them. In all cases the cost of the work is borne by the board and not by the harbour rates. The appellants' counsel

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laid considerable stress upon sects. 96 and 134 of the Greenock Harbour Act of 1842, which authorize the trustees to cause the harbour "and the bed of the river opposite the same," to be cleansed and deepened in such manner and to such extent as they may think fit, and also to remove "any wreck and other obstructions to the said harbours and the approaches thereof." The cost of these operations is laid upon the harbour rates, and I think the operations sanctioned upon the bed of the river were to be confined to the immediate vicinity of the works, and were meant to secure a sufficient depth of water, free from obstructions, alongside the piers and at the harbour entrances.

The appellants maintain that for a long course of years anchorage dues were levied from vessels moored in the waterway, or at the Tail of the Bank, quite irrespective of their intended port of discharge. As already explained, these dues, although collected by the trustees, were in reality levied by the municipality, as feuars of the port, and not by the harbour authority. Still, I do not think that circumstance would impair the significance of the fact if it could be shewn that they were regularly exacted as dues for the use of the port of Greenock from vessels which did not enter or use the harbour works for any purpose. But the evidence comes far short of that. The anchorage dues amounted to a considerable sum annually, but the trade of the harbour of Greenock has been very large, and no attempt has been made to prove the proportion of the total sums collected from vessels which merely anchored, but did not break bulk, within the limits claimed by the appellants. So far as regards vessels which did not unload at or into Greenock Harbour, the evidence is both scanty and unsatisfactory, and merely proves that attempts were frequently made, often, if not generally, without success, to levy anchorage dues from them. Eventually these dues were acquired by the harbour trust, and have not been exacted since the year 1868.

There is some evidence to shew that many years ago vessels occasionally dropped their anchor outside the harbour works; but it is conclusively established that the narrow waterway is not and cannot, without detriment to the navigation of the river,

be used as a place for mooring and loading and unloading ships. There are, no doubt, several buoys with mooring rings along the edge of the sandbank, on the north side of the channel; but these have not been used for loading and discharging, and were placed there for the convenience of vessels warping out of or into the inner harbours.

In these circumstances, the appellants appear to me to have failed to prove any facts which can reasonably be held to warrant the inference that the port of Greenock extends to the whole of the navigable channel, or to the Tail of the Bank. The ambit of the commercial port must, in my opinion, be taken to include merely the artificial works vested in the harbour trustees, and such contiguous waterspace as may be necessary for the accommodation of vessels using these works. What the precise extent of that space may be I do not find it necessary to consider, because it cannot embrace that part of the channel where the *Afton* capsized. The roadstead at the Tail of the Bank may be, in a certain sense, a port; but it is a roadstead over which the Greenock harbour trustees have no authority or control, and is used as a common anchorage by ships navigating the firth and river, whatever be their starting place or destination. It is no more an adjunct of the harbour of Greenock than of the harbours of Broomielaw or Port Glasgow.

I am accordingly of opinion that the interlocutor appealed from ought to be affirmed, on the ground that the *Afton* was not, at the time of the accident, within the limits of the port of Greenock. I am not at present prepared to concur in the second reason assigned by the Lord Ordinary for his judgment. The respondents argued alternatively, that, assuming the place of the accident to be within the limits of the port of Greenock, the *Afton* was no longer "in port," within the meaning of the policies, after she had broken ground, and was proceeding on a new voyage. In my opinion, that is a question requiring consideration, and is not (as Lord Shand seems to hold) necessarily ruled either by *Sailing Ship Garston* v. *Hickie* (1) or by *Roelandts* v. *Harrison* (2): but, in the view which I take of the facts of this case, it is unnecessary to decide the point.

(1) 15 Q. B. D. 580. (2) 9 Ex. 444.

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LORD FITZGERALD:—

My Lords, it seems to me that it would have been unfortunate if your Lordships had to determine in this suit once and for all on the rights of the trustees of the port and harbour of Greenock which the pursuers in their own interest undertook to establish. The suit is really between two classes of underwriters, and the contest is as to which of the two classes, if either, is liable to make good the losses sustained by the shipwreck of the *Afton*. The trustees are not parties to the litigation, and are not represented. The matter of fact on which the pursuers' case rests is that the *Afton* at the time of her shipwreck was in the port of Greenock. The pursuers have in the first instance no case whatever until they have established that fact, and the issue lay on them. The term "port," in its ordinary sense, says Duer, is equivalent to "harbour," and may be taken to mean a space of water so inclosed by the land," (or, I may add, so protected by artificial works,) "as to be practically safe from the perils of the ocean; but it may have a more extended meaning, and may include an exposed and open roadstead, or a bay, or other portion of the sea." That sense may be adopted if it was plainly within the meaning and intention of the parties. There is nothing on the face of the policies to guide us. The policies are "to any port or ports of call or discharge, and while in port during thirty days after arrival." No port is named. We are driven to look to the contention of the pursuers and the evidence to sustain it. The contention of the pursuers (appellants) was that the port of Greenock in its ordinary accepted commercial meaning included the place where the ship was lost, and on the other hand the defenders' (respondents') main allegation in defence was that the ship had left the port and was in the fairway of the Clyde, and outside the port at the time when she capsized. The question immediately before your Lordships is whether the pursuers have established to your satisfaction by the proofs which they have given that the part of the fairway channel of the Clyde in which the calamity occurred, is in the port of Greenock, or, in other words, that she was lost "while in port."

My Lords, the outline of the case has been so clearly and fully given by my noble and learned friend opposite (Lord Watson)

that it is wholly unnecessary further to refer to the facts. I entirely concur with my noble and learned friends who have preceded me that the pursuers have failed to establish their contention that the place where the accident happened was in the port of Greenock. I can add nothing to the reasons already given. There were other questions in the case of importance, and especially those arising on the construction of the policy, on which it is not now necessary to say anything. I concur in your Lordships' opinion that the decision of the First Division of the Court of Session adhering to the judgment of the Lord Ordinary should be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 30th July, 1888.

Agents for appellants: *Stibbard, Gibson & Co., for Boyd, Jameson & Kelly, W.S., Leith.*

Agents for respondents: *Hollams, Son, & Coward, for J. & J. Ross, W.S., Edinburgh.*

[HOUSE OF LORDS.]

JOYNT'S DIVORCE BILL.

Divorce—Practice—Personal Service out of the Jurisdiction—Affidavit of Service—Statute 18 & 19 *Vict. c.* 42.

The respondent in a divorce bill being out of the jurisdiction and the petitioner in poor circumstances, the House dispensed with the attendance at the bar of a witness to prove personal service of the bill and the several orders of the house on the respondent; and ordered that an affidavit proving such personal service, and sworn under 18 & 19 Vict. c. 42, before the British minister or consul at the place where the respondent resided, should be deemed sufficient proof of such service.

BILL to dissolve the marriage between the promoter, Richard Watson Joynt, newspaper proprietor, Ireland, and the respondent Catherine Barker Joynt, or Sorsby. The parties were married in 1867. The respondent became addicted to habits of intemperance, and between the years 1877 and 1879 she was guilty of adultery. This the promoter discovered in 1879, and immediately took

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steps to obtain in the Irish Courts a divorce à mensâ et thoro. He also brought an action for criminal conversation against her seducer.

On the 19th of January, 1880, the respondent wrote a letter to her husband confessing her guilt, and she subsequently confessed it on oath in court, at the hearing of the action for criminal conversation, as a witness called by her husband. On the 12th of May, 1880, Baron Dowse gave judgment in the action of criminal conversation against the respondent's seducer for heavy damages, which, however, he had not recovered. On the 12th of July, 1880, a final decree of divorce à mensâ et thoro was pronounced; the respondent not appearing.

Owing to the promoter's want of means he had been unable to promote this bill until now.

The respondent was resident in New York.

On the 8th of May, 1888, the House met to consider the petition of the promoter that a duly attested copy of the bill, together with notice of the second reading and the usual orders of the House, might be transmitted to D. G. G. residing in New York, who knew the respondent, and that the attendance of D. G. G. to prove the personal service of the copy of the said bill, &c., on the respondent might be dispensed with, and that an affidavit of D. G. G. of such personal service, sworn before the British consul in New York under the 18 & 19 Vict. c. 42, might be deemed to be good and sufficient proof of such service.

Lewis Coward, for the petitioner, cited *Robotham* v. *Robotham* (1).

The House (Lord Halsbury, L.C., Earl of Selborne, and Lords Watson, FitzGerald, and Macnaghten) allowed the prayer of the petition, and ordered accordingly.

Lords' Journals, 8th May, 1888.

(Second Reading.)

June 12. This was a meeting of the House to hear counsel and witnesses on the second reading of the above bill.

(1) 27 L. J. (P. D. & M.) at p. 34.

Lewis Coward, for the promoter:—

By means of a registered letter certified copies of the bill and all the orders of this House were sent out to D. G. G. in New York, and he served these documents upon the respondent there; and transmitted back again the copies of the documents so served; each document so returned bears a memorandum of the service, and the seal of the British consul at New York.

A witness produced an affidavit sworn by D. G. G. before the British consul at New York, setting forth—that the deponent did on the 28th of May, 1888, at 83, Mercer Street, New York, United States, personally serve the respondent, whom he knew as the same person who was the respondent to the petition presented in 1880 by the promoter in the Matrimonial Division of the High Court of Justice in Ireland, and who is also the same person as the Charlotte Barker Joynt named in the bill, with an attested copy of the bill, a duplicate attested copy whereof is now produced, by delivering to and leaving with the said respondent the first-mentioned attested copy: (2) that he did at the same time and place deliver to and leave with the said respondent true copies of the several orders of this House now also produced; and also shewed to the said respondent the originals of the said orders: (3) that he also delivered and left with the said respondent a true copy of the notice of the second reading.

Evidence as to the adultery was then given.

The respondent did not appear.

Lord Halsbury, L.C.:—

The facts necessary for the promoter to prove in this case have been amply established.

Lords Watson, FitzGerald, and Macnaghten, concurred.

The bill was then read a second time, and ultimately passed the House of Commons and received the royal assent.

Lords' Journals, 24th July, 1888.

Solicitors for promoter: *Pickett & Mytton, for S. C. McCormick, Dublin.*

[HOUSE OF LORDS.]

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MACPHERSON . . . . . APPELLANT;

AND

SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED, AND OTHERS . . . . . RESPONDENTS.

Public Right of Way—Thinly-populated District—Evidence of User.

In an action claiming a public right of way over a track or natural mountain pass about fourteen miles long, running through a thinly-populated district of the Highlands of Scotland and connecting by the shortest route Braemar and Clova, it appeared from the evidence of user that the track in question had been used by the public on foot; by drovers twice a year driving sheep from a market held at Braemar to one held near Clova; that public subscriptions had been collected for a bridge in line of the track; that some distance up the disputed track there was an old milestone, and, that a proprietor in planting trees had specially left a space for the track:—

Held, affirming the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 875), that the amount of user, having regard to the character of the district, was such as might have been expected if the track had been admittedly a public way and not the subject of mere tolerance, and that the evidence was sufficient to establish the right of way.

APPEAL from the Second Division of the Court of Session, Scotland (1).

This was an action of declarator of right of way raised by the respondents, the Scottish Rights of Way and Recreation Society, Limited, and two members of the public, one residing in Braemar and the other in Clova, against the appellant Duncan Macpherson, proprietor of Glen Doll. The respondents contended "that there exists a public road or right of way for passage on foot or horseback, and also for driving cattle and sheep in or near the direction shewn by the red line A, B, C, D, E, on the plan produced, leading the said road from the point A or a point near thereto on the public highway between Braemar and Blairgowrie ascending Glen Callater, and descending the Glen of the White

(1) 14 Court Sess. Cas. 4th Series, 875.

Water and Glen Doll to the point E, or a point near thereto on the public highway proceeding down Glen Clova to Kirriemuir."

The appellant denied the existence of a right of way from C, or the point where the alleged track passed down the Glen of the White Water by a steep and rugged path called "Jock's Road," and thence down the Glen of the Doll past the appellant's shooting lodge to a farm standing at D., called Braedownie.

The portion of the track from A to C ran, inter alia, through the property of Colonel Farquharson of Invercauld, who stated he never interfered and had no intention of interfering with the right of way; and that from D to E was admittedly a county road, the question therefore was confined to that strip of road from C to D, running through the appellant's property.

The substance of the respondents' case was that there was a spring market and an autumn market at Braemar, and also a spring and an autumn market at Cullow, a place to the south of Clova; that the Cullow market being held shortly after the Braemar market in both seasons it was the practice to send over to Cullow the stock undisposed of at Braemar, and that the road by which the stock came was the road claimed; that between the dates of these markets the road was occasionally used for driving cattle and sheep, and by drovers and shepherds from a distance; that the road was frequently being used by the inhabitants of Clova and Braemar and other members of the public; and that the track had been in all these ways used for over forty years.

The Lord Ordinary (Lord Kinnear) after a proof—a summary of which will be found in the report of his Lordship's judgment in the Court of Session (1)—held, on the 19th of March, 1887, "that there exists a public road or right of way for foot-passengers, and also for driving cattle and sheep leading from the point A on the plan, or a point near thereto on the public highway between Braemar and Blairgowrie, ascending Glen Callater and descending the Glen of the White Water and Glen Doll to the point E on the said plan, or a point near thereto on the public highway between Glen Clova and Kirriemuir."

On the 6th of July, 1887, the Second Division adhered (Lord Young dissenting) (1).

(1) 14 Court Sess. Cas. 4th Series, 875.

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On appeal,

1888. May 8, 11. *The Solicitor-General for Scotland* (*J. P. B. Robertson*, Q.C.) and *Asher*, Q.C., (of the Scotch Bar) (with them *J. R. Cosens*), were heard for the appellant.

[They cited *Marquis of Breadalbane* v. *McGregor* (1); *Porteous* v. *Allan* (2); *Jenkins* v. *Murray* (3),]

Balfour, Q.C., *A. Graham*, *Murray*, and *W. C. Smith* (all of the Scotch Bar), for the respondents, not called upon (4).

LORD HALSBURY:—

My Lords, looking at what has been said by Lord Young (5) in this case and at what has been the course of the evidence, if I had been unable to find an answer to the question which his Lordship has propounded I certainly should have desired to hear the respondents in this appeal; but in considering the evidence which has been brought before us I should very much regret that upon what is after all a pure question of fact I should differ from such a large majority of the learned judges,—the Lord Ordinary and the majority of the judges of the Court of Session, who had the facts before them, who must be very much better acquainted than I myself can be with the habits and practices of the country, and who are such very distinguished representatives of it.

My Lords, the question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public. That, however, is not the law of Scotland; and if it can be established that for the necessary period there has in fact been such a use of the way as negatives a mere licence or permission, then as I understand the law of Scotland that establishes absolutely the right of way in question.

(1) 7 Bell's App. 43.
(2) 5 Brown's Sup. 598.
(3) 4 Court Sess. Cas. 3rd Series, 1046.
(4) The Respondents quoted in their printed case, Lord Deas in *Mackintosh* v. *Moir*, 9 Court Sess. Cas 3rd Series, at p. 577.
(5) 14 Court Sess. Cas. 4th Series, at p. 885.

Now I have said that a question is put by Lord Young to which, if I were not able to give an answer, I should feel that the respondents ought to be able to furnish it to me. Lord Young, quoting the Lord Ordinary, says, "The question is whether such use as has been proved is to be ascribed to tolerance or right. Why, I venture to ask," says Lord Young, "is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or interfered with it by appealing to a Court of Law to prevent such use of it, upon any of the occasions which have been referred to? Why, he would have been thought very ill of by his neighbours, and I think deservedly." Now I say that if no answer could be given to that question I should take a different view from that which I have been at last compelled to take. But when I look at the evidence I find that beside the occasional and rare use of the way by persons who would properly come within the ambit of Lord Young's observations, there are a set of facts which, I think, are not reconcilable with what his Lordship refers to as kindliness and good neighbourliness. If there is one fact more than another which stands out, I think, clearly established by the evidence and not qualified by any cross-examination, it is this, that upon this road from Braemar to Glen Clova there were at least two occasions in every year, and for a very considerable period, when those persons who had not been able to dispose of their sheep at Braemar made a regular, well-known and ascertained practice of bringing those surplus sheep which they had not been able to dispose of at the Braemar market to the other market.

Now I ask myself this question, whether in the first place I can infer from that state of facts that the proprietor was aware of what took place. I cannot doubt that dealing with such public rights and such matters as the markets which persons in the neighbourhood were in the habit of going to and coming from, it would be almost impossible but that the proprietor would become acquainted with that practice. And the second question immediately follows, whether, if he was aware of the long-continued and well-settled practice which was going on from year to year (not through the whole year of course, because the occasions did not arise, but on two ordinary and settled occasions in every year),

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the proprietor would, on the footing of its being a mere licence or permission, be likely to stand by and allow the right, which he must know would very probably be established by such constant user, to be established without interference or remonstrance on his part. My Lords, I have come to the conclusion that it would be impossible to sustain that contention. However good-natured the proprietor might be, and however desirous of assisting his neighbours, I think he would desire to protect his rights by insisting upon some record of his rights or some way of shewing that what was being done was by his licence and permission and not as of right; but I look in vain throughout the whole of this evidence for the least intimation of any effort on the part of the proprietor to impose upon those persons who were using this road—which was a wild mountain road and one unfrequented, no doubt, on ordinary occasions—any kind of hindrance which could be removed by his permission.

Under these circumstances, my Lords, I cannot but feel that the observations made by the Lord Justice Clerk and Lord Craighill are well founded; and apart altogether from what I should certainly regard as absolutely insufficient to establish any such right, namely, the evidence of the occasional and rare use of this road by travellers passing through, or botanist excursions, or the use by friends and neighbours, who are clearly proved to have used part of the road and might very well be supposed to use that part of the road without any supposed right to traverse it from end to end—apart from all that class of evidence to which I think Lord Young's observations apply with great force, I cannot reconcile this market user, which was of necessity from one end to the other because it was from one market to the other, and which was continuous from year to year and on the particular occasions whenever a market was held, with anything but the existence of a public right; and under these circumstances I move your Lordships that the judgment of the Court below be affirmed, and that the appeal be dismissed with costs.

EARL OF SELBORNE:—

My Lords, I entirely agree, and I am so well satisfied with the reasons given by the majority of the judges in the Court below

and by the Lord Ordinary that I do not think it necessary to say more than a very few words.

It appears to me, in the first place, that the evidence is as great in quantity and as cogent in its effect as could be expected under the circumstances of the place and of the country, if the right did exist and had existed from a very remote period; and that being so, I think it would be rather alarming if, without evidence of some kind to counterbalance the impression so made, the evidence given were held insufficient; because it would follow, that practically, under such circumstances, no amount of evidence would establish such a right. Well, is there evidence to counterbalance it? I own that I think there is none.

Now, when you have the fact of user of a road of this description in the manner and to the extent which would be the natural consequence of its being a matter of public right, and that fact proved by a sufficient amount of evidence, how is that to be met? According to the well-known text of the civil law a claim of right of this kind will be repelled if it is shewn to have been enjoyed *vi* (which is out of the question here, for certainly there has been no force), or *clam* (which I think is equally out of the question, for whatever use there was was so public that it must have been known), or *precario*; and that is the real question here. What is suggested by Lord Young is that it is consistent with the evidence in this case, that what was done might have been done *precario*, that is, by sufferance, by virtue of leave and licence from time to time on each particular occasion to those who would otherwise have been trespassers. Now I confess that, upon such evidence as we have here, I think that is a strong proposition, unless there are some definite facts brought forward in support of it. When I speak of "such evidence as we have here," I refer more particularly to those things which are most unequivocal—that this passage has taken place along a definite track (I think the evidence shews that even at the point where it is least definite, namely, towards the summit at Jock's Road, the boulders have been cleared away, and there is a sort of ladder or staircase in the rock, such as most people are familiar with in very mountainous districts and countries) from one public terminus to another public terminus; there is a known line of passage and a definite

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track. It is not as if people made their own way, some in one direction and some in another; but the evidence appears to me to shew without controversy or contradiction that this is a definite passage between one public terminus and another, which according to the law of Scotland is necessary to make a public way. Then, in the next place, although, except at certain periods and for certain purposes, the use of it may be so casual that if that had stood alone it might have been insufficient to make out the right, yet the periodicity and the nature of the purposes which at those periods caused the use of it to take place give emphasis to the other circumstances, as calculated to call the attention of the proprietors and occupiers to the matter, and to lead either to interference or to definite permission if the thing were not of right. And I may mention (not supposing that so remarkable and conspicuous an instance frequently took place) the evidence, which is not controverted, about the several droves of sheep which several different persons took over the pass in 1875. It seems to me that this alone must have brought the parties into a sort of conflict with each other, and have led to an understanding whether the thing was to go on upon the footing of a right or otherwise, if it had been really challenged.

My Lords, I then ask the question, whether there has been any leave or licence or tolerance or sufferance, regarded as a question of fact. Is there any evidence whatever given in support of the affirmative of that opinion? Absolutely none. I find from the beginning to the end not a trace of such a thing—not only no proof of there having been any act which would fairly have that meaning, but I do not find the least trace of its having been suggested or thought of by anybody. On the contrary, it is, to my mind, fully proved, both that the parties who used this road understood themselves to be doing so as of right, without need for anybody's permission, and that the occupiers and owners, at least for a very considerable time from the present (though perhaps not enough by itself to have established a right), understood that to be so, acquiesced in it, and themselves acted upon that supposition. There were several instances. I will not insist upon them as enough by themselves to establish the thing, because the dates of them are too recent. There was the soli-

citing of public subscriptions, and the obtaining of them, for a bridge, in which the public would have had no interest except upon the supposition that this was a public right. Then, when one of the owners planted a certain place, a space was left on purpose for this road, clearly because he thought it was a public road; and there were some other things which I need not mention; it is enough to say that it appears to me to be the true result of the evidence that everybody, both those who used the road and those over whose ground it was used, thought, and acted upon the opinion, that it was a matter of public right, and not to be resisted. As far as there is evidence at all, it is all that way.

Under these circumstances, I confess that I do not think it possible to differ from the conclusion arrived at in the Court below.

LORD WATSON:—

My Lords, having regard to the character of the track in dispute, and to the thin population of the district in which it is situated, I think the amount of actual user, for upwards of forty years past, has been just such as might have been expected if it had been admittedly a public way.

That being so, the case is narrowed to the issue—Was such use had in the exercise and assertion of a public right, or must it be ascribed to the tolerance of successive proprietors? Notwithstanding the able arguments addressed to us by the Solicitor-General for Scotland and Mr. Asher, I have been unable to come to the conclusion that the use was by sufferance merely. It appears to me to have been generally understood, as well by those who used the road as by those who stood by and saw it used, that foot-passengers and drovers were free to pass along it as a matter of right, and that no permission was required.

After the observations which have been made by the Lord Chancellor and by the noble and learned Earl opposite, it is unnecessary for me to refer to the evidence in detail. I concur in the judgment which has been proposed.

LORD FITZGERALD:—

My Lords, I also concur, and especially in the observations which have been made by my noble and learned friend opposite

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MACPHERSON v. SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY.

Lord FitzGerald.

(Lord Watson). If this case had gone before a jury, the question to be submitted to the jury would have been whether there had been an exercise, as of right, of the user of this way; and I should say that the proper inference to be deduced by the jury from the evidence would have been that there had been that continuous exercise—an exercise not by sufferance, but as of right. The case comes, as far as I am concerned, in a still stronger light before me, for the Lord Ordinary, who heard the witnesses and examined into the case in detail, comes to that conclusion, and his decision is adopted by the majority of the judges of the Court of Session. Upon the question of fact, or of the fair inference to be deduced from the facts in proof, I should have been very slow indeed to take an adverse view if the question had been decided upon its being submitted to a jury, but still more so when the determination is that of so many able and learned judges conversant with the law of Scotland and with the mode of dealing with rights of this kind in Scotland. When we find, then, that there is evidence of the user of this way as of right, extending over a period of at least forty years, or more than forty years, even if we had some evidence of interruption or intended interruption, it would be valueless.

The law on this subject was stated fifty or sixty years ago by the then Lord Commissioner in very clear terms. I allude to *Harvie's Case* (1), which was brought up to this House by appeal in 1828, and in which the ruling of the Lord Commissioner in point of law to the jury in the view which they took of the facts was adopted by Lord Lyndhurst. Lord Lyndhurst puts it thus:—"The learned judge in substance told the jury, There is evidence from which you may assume that for a particular period, namely, for forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you in point of law that subsequent interruptions not acquiesced in cannot defeat the right so acquired" (2).

We had a great deal of consideration of the law of Scotland

(1) 3 Wil. & Sh. App., July 8, 1828, 251.

(2) *Harvie* v. *Rodgers*, July 8, 1828. 3 Sh. & W. App. at p. 260.

on this subject in the case of *Mann* v. *Brodie* (1), and *Harvie's Case* (2) is a distinct confirmation of the doctrine which I have mentioned.

I am, therefore, of opinion that the interlocutor of the Court below ought to be affirmed.

LORD MACNAGHTEN concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 14th May, 1888.

Agents for appellant: *Iliffes, Henley, & Sweet, for Tait & Crichton, W.S., Edinburgh.*

Agents for respondents: *Keeping & Gloag, for Andrew Newlands, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

KNOX AND OTHERS . . . . . APPELLANTS;

AND

MACKINNON . . . . . RESPONDENT.

Trustee — Investment — Loan on Trade Premises and Personal Security — Negligence — Power to lend on "Heritable and Personal" Security — Immunity Clause—Law Agent acting for both Lender and Borrower.

Trustees sold a tenement, the property of the trust, to one of seven beneficiaries under the trust deed, the price in terms of the contract being payable in May, 1874. In November, 1874, the purchaser being unable to pay £12,000 of the price, was allowed to retain it on loan. As security for the loan, he conveyed to the trustees three houses, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two-thirds of the estimated value as stated by the borrower. Besides these securities the trustees held the personal obligation of the borrower and his father-in-law; both of whom were engaged in trade. Some of the other beneficiaries remonstrated in 1874, and again in 1880; but the money was allowed to remain on these securities until 1884, when the borrower and his father-in-law became bankrupt, and about £10,000 was lost to the trust. The trust deed

(1) 10 App. Cas. 378. (2) 3 Wil. & Sh. App., July 8, 1828, 251.

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contained (1), a clause empowering the trustees to lend out the proceeds and other funds of the trust on "such securities heritable or personal" as they might think proper; and (2), an immunity clause declaring that the trustees should not be liable for "omissions, errors, or neglect of management." The same law agent acted for the trustees and the borrower:—

Held, affirming the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 22), that the trustees had not acted with perfect impartiality between the beneficiaries, nor had they brought to the management the same care and diligence which a man of ordinary prudence would have exercised in his own concerns, that in these circumstances neither the immunity clause nor the authority to lend on personal security were sufficient to protect them, and that they were personally liable to make good the deficiency in the trust funds.

APPEAL from the Second Division of the Court of Session, Scotland (1).

John Millar, wholesale and retail draper, Glasgow, by his trust, disposition, and settlement, appointed William Millar, his son by his first wife, John Knox, Gavin Miller, and John Bow, as his trustees. Robert McCowan was afterwards assumed as a trustee, and John Bow died before the transactions called in question occurred.

This action was raised in the Court of Session by the judicial factor on John Millar's trust estate against John Knox, Gavin Miller, and Robert W. McCowan, the son and representative of Robert McCowan (2). Besides William Millar, the only child by

(1) 14 Ct. Sess. Cas. 4th Series, 22.

(2) Since the presentation of the petition of appeal Robert W. McCowan has died, and on the 3rd of July, 1888, the surviving appellants petitioned the House for an extension of time until the 1st of November, 1888, for the presentation of the petition to revive the appeal by reason of the death of Robert W. McCowan, late one of the appellants, or that failing the presentation of such petition, the petitioners, as the surviving appellants, may be at liberty alone to continue the appeal. The Appeal Committee (H. L., July 6, 1888) refused any extension of time (1) because it required no leave to enable the surviving appellants to prosecute the appeal by themselves; and (2) that they ought not to be allowed to hang up the appeal till the expiry of six months from R. W. McCowan's death, until which period his representatives could not be *compelled* to become parties to the appeal. On the 16th of July, 1888, Robert McCowan and David McCowan the younger, co-trustees and executors of Robert W. McCowan, petitioned that they might be considered as appellants in the place of Robert W. McCowan, and that the appeal might be in the same condition as it was at the death of Robert W. McCowan; allowed, the respondents consenting.

his first wife, John Millar left his second wife surviving him and six children, all under age at his death, the eldest being G. A. Millar. John Millar by his trust disposition, settlement, and codicil, directed his trustees to pay his widow an annuity of £400, and to divide the rest of his estate among his children; and in respect that his son William Millar had already attained majority, and that his conduct had been such as to please and satisfy him, while he had been of great service in business, he directed his trustees to pay William Millar's share of the residue of the estate at the first term of Whitsunday after his (the truster's) death. He also gave power to the trustees, in the event of their being dissatisfied in any respects with the behaviour or habits of any of his sons to withhold their share and only give them the liferent thereof. The trust disposition and settlement then contained this clause—"Declaring that as I have full trust and confidence in the integrity and ability of my said trustees, and feel satisfied that they will act in the execution of this trust as shall appear to them most for the benefit thereof, they shall not be liable for omissions, errors, or neglect of management, nor singuli in solidum, but each shall be liable for his own actual intromissions only; and for the better enabling my said trustees to carry the foresaid purposes into effect, I hereby authorize and empower them, when they shall consider it necessary or expedient, to dispose of my whole estate, heritable and movable, either by public roup or private sale, and to lend out the proceeds and other funds of the trust, or such parts thereof as may not be otherwise required, on such securities, heritable or personal, as they shall think proper; and I also authorize them, if and when they shall consider it necessary, to borrow money on the security of the trust estate; and to grant all requisite deeds to the lenders."

John Millar died in 1863, and his estate consisted chiefly of unburdened heritable estate in Mitchell Street and High Street, Glasgow; stock-in-trade; and the going business of a wholesale and retail draper, carried on in High Street, Glasgow. William Millar was a partner with his father, and at the first balance after the latter's death shewed £4400 to the father's share, and £2300 the son's share. William Millar resigned his trusteeship and

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continued the business, the trustees giving him a lease of the High Street building for seven years, with power to renew, and leaving his father's capital with him. For ten years his stepmother was his partner, after which he continued the business alone. In 1874, when the second term was running, the business was in a most flourishing condition, and William Millar was anxious to obtain an extension of the lease of the High Street property for ten years after the expiry of the second period of seven years. But on the 26th of March, 1874, the members of the second family sent a request to the trustees to bring the High Street property to a sale, in order to secure the unusual advantages of the state of the market, and also because some of the beneficiaries required their capital. Counsel advised the trustees that it was their duty to realise the property. On the 4th of May, 1874, the trustees consulted eminent property valuators, as to the value of the High Street property, who represented that it was low-rented, and that its value was £19,000.

A few days afterwards it was agreed between the beneficiaries and the trustees that the latter should be authorized to sell the High Street property privately for £25,000, provided that a sale at or about that price is effected within fourteen days from this date (7 May, 1874), it being a condition that the purchaser's entry shall be, and the price payable as at Whitsunday first, and to bear interest at and from the term during the nonpayment at the rate of 5 per cent. per annum. On the 8th of May, 1874, the trustees accepted the offer of William Millar to purchase the High Street property for £25,000, "settlement to take place in May, 1874"; but the whole purchase-money was not paid.

On the 31st of October, 1874, William Millar wrote to Mr. George Black, the trustees' agent, who was also William Millar's agent, as follows:—

"In reference to the recent purchase of property at 20, High Street, from my late father's trustees for £25,000, I have arranged for a loan of £17,000; and as my father's trustees will have a good deal of money to lend, I beg leave to make application through you to them for the loan of £12,000 sterling, tendering to them the following unexceptionable heritable and personal

security—all to be arranged at Martinmas term—requesting you to lay this before them at their first meeting.

I am, &c.,
Wm. Millar.

Property, 30, High Street, valued by						
Mr. Graham	£6000	0	0			
Bond	4000	0	0			
Reversion				£2000	0	0
Shops and back-lands, 34, 36, 40, 42,						
High Street	£15,600	0	0			
Bond	11,000	0	0			
Reversion				4600	0	0
Property, 20, High Street	£25,000	0	0			
Bond	17,000	0	0			
Reversion				8000	0	0
Life policy				2160	0	0
One-seventh part of £10,000				1428	11	5
				£18,188	11	5

and besides the above, the personal security of myself and my father-in-law, Andrew Walker, Esq. of Hartwood, West Calder.

The said life policy is already assigned to my father's trustees, and will be held by them against proposed loan."

These heritable subjects were all lying contiguous to one another, and had been all separately valued by Mr. Graham, the first in April, 1873, at £6000; the second in March, 1874, at £15,600, and that bought from the trustees in June, 1874, at £25,000, these values were obtained for the third parties who lent on them £4000, £11,000, and £17,000 respectively. The Mr. Walker referred to in the proposal was a club draper and in good credit, and alleged to be possessed of an estate valuable for its minerals. The life policy for £2160 was valued for surrender ten years later at £500: and the one-seventh share of the £10,000 was subject to the widow's liferent, who, however, was an elderly lady.

The beneficiaries allege that if the trustees had carefully considered and examined this heritable property offered in security they would have ascertained the following facts:—

(1.) The property in High Street valued in the proposal at the £6000, was bought by William Millar at Whitsunday, 1873, for £5500,

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and he borrowed £4000 upon the said property leaving a margin cost of . .	£1500	0	0
(2.) The property valued in the proposal at £15,600 was purchased by W. Millar at Whitsunday, 1874, for £13,650, and he borrowed £11,000 upon the property leaving a margin cost of	2650	0	0
(3.) William Millar had arranged to borrow £17,000 over the property in High Street purchased from the trustees for £25,000 leaving a margin cost of . . .	8000	0	0
The prior bonds therefore represented about three-fourths of the costs of the properties, and the £12,000 was upon a margin of .	£12,150	0	0

leaving a margin of cost of only £150.

The beneficiaries also alleged that William Millar's capital in the business did not exceed £6000.

The trustees agreed to lend the £12,000, the notes in the minutes of the meeting of the trustees on the 2nd of November, 1874, being "A letter was submitted from Mr. William Millar making a proposal for a loan of £12,000 from the trust funds, on the securities noted therein; and the trustees having carefully considered the same agreed to give the loan required." W. Millar paid to the trustees £13,000 of the price of £25,000; and a bond containing obligations by William Millar and Andrew Walker and a conveyance in security of the properties mentioned in the proposal was granted to the trustees.

On the 27th of November, 1874, Alexander G. Millar, the eldest son of the second family, and now over age, wrote to the trustees:—

"It is as well to make known to you in this form that I and the rest of our family strongly object to £12,000 of our father's estate being lent to my brother William on his property in the High Street, and on the personal security of his father-in-law, Mr. Walker."

Then the letter narrates, "There are already four bonds over it, although they are not over the same parts of the property."

And continues, "Your bond is therefore second to third and fourth bonds, and third to the first and second. I protest for myself and the rest of the family against this investment. The property is thus burdened altogether for £44,000, and it is plain to anybody that there is not a shilling of margin in the security.

"You will please therefore to understand that the investment is made not only against our wishes, but against our objections, and that we will look to the trustees for the £12,000, if it should be lost in whole or in part by the insufficiency of the security."

The beneficiaries allege the trustees did not answer this letter. The following minutes appear in the trustees' minute book, on the 6th of January, 1875. "There was read to the trustees a letter addressed to them by Mr. A. G. Millar, dated the 27th of November last."

On the 11th of January 1876, "The trustees also looked into several securities and were satisfied they were all good, having been reported on by properly qualified valuators. The principal property in High Street was specially reported on by Mr. McMichael, and his report is directed to be engrossed after this minute."

Mr. McMichael's report was dated the 18th of December, 1874, and set out that the trustees "have ample security for the additional loan of £12,000, which they have made over the bonds already existing on the properties." Mr. McMichael "values the whole properties at £48,550, upon which there were prior bonds to the amount of £32,000, leaving a margin of £16,550 as security for the £12,000."

On the 13th of January, 1880, Mr. A. G. Millar again wrote the trustees:—

"Fully more than five years ago I wrote a letter to you on behalf of the other members of the family and myself, of which a copy is enclosed. It called attention to the risk of lending a large sum of money to Mr. Millar on security which was plainly insufficient. During the long period that has since elapsed, no endeavour has been made to realise the investment, or any part of it. The depression of trade and in the value of property renders it still more insecure, and I beg again to call the attention

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of the trustees to it, and to renew the protest then made. I think it advisable that the trustees, for their own sake as well as for the trust, should make some arrangement for the reduction of this debt. As soon as a meeting is called, and a decision arrived at, I shall be glad to hear the result."

The trustees on the same day, the 13th of January, 1880, directed their agent "to reply that they had carefully considered the security before they gave the loan, and were satisfied with it, and saw no reason for disturbing the loan at present." At this meeting of trustees they appointed Mr. William T. Duncan in place of Mr. R. McCowan, who was ill. Mr. McCowan died in March, 1880.

In 1884, William Millar's firm—he had assumed a son as his partner—suspended payment, and the prior bond-holders entered into possession; and it appeared there would be no balance from the properties available for the payment of the £12,000. The estimated dividend on the firm's estate was 8*s.* 8*d.* in the pound; and that on the individual estate of William Millar about 2*d.* per pound. Mr. Walker also became insolvent, and the respondent has with the approval of the defenders, for any interest they may have, concurred with Mr. Walker's other creditors in acceding to a private composition arrangement, and dividends to the extent of 4*s.* 9*d.* have been paid to Mr. Walker's creditors, and a further dividend is estimated at 1*s.*

Other loans made by the trustees were also questioned, but they are not involved in the appeal.

On William Millar suspending payment, John Knox and Gavin Miller resigned their trusteeship, but the beneficiaries refused to grant a discharge. Mr. Duncan was then sole trustee.

On the 28th of February, 1885, the widow and children of the second marriage obtained the sequestration of the trust estate and the appointment of the respondent Mr. Mackinnon as judicial factor. Mr. Duncan has since died.

On the 19th of May, 1886, the Lord Ordinary (Lord M'Laren) found, inter alia, that the sum of £12,000 was lent by the trustees on unsubstantial and insufficient securities contrary to the law and practice of trust administration, and that the trustees were

personally liable. This decision was adhered to by the Second Division of the Court of Session on the 2nd of November, 1886 (1).

On appeal,

July 16, 23, 30. *Rigby*, Q.C., and *Dickson* (of the Scotch Bar) for the appellants :—

The testator declared his trustees were not to be responsible for "omissions, errors, or neglect of management." With such an immunity clause very gross and culpable neglect must be clearly proved before the Court can hold the trustees personally liable. Here the beneficiaries were anxious for the sale, and they knew perfectly Mr. W. Millar's pecuniary position. The trustees were guided all along to do the best for the trust estate, and with Mr. W. Millar's aid they were enabled to divide a much larger sum among the beneficiaries. As to Mr. A. G. Millar's letter of 1874, it would have been unreasonable to recall the loan immediately it had been made.

[LORD WATSON :—A prudent man may have to take a security he does not like, but he gets rid of it as soon as possible by having it paid up by instalments.]

The trustees had not only a margin, but also the personal bond of the debtor, who could shew a flourishing trade involving none but ordinary risks, and the personal security of Mr. Walker, said at that time to be worth £40,000.

[LORD HALSBURY mentioned *Learoyd* v. *Whiteley* (2).]

In the law of Scotland, where trustees, as here, have been given power to lend trust funds on heritable or personal security, personal security has been understood as being the mere personal bond or obligation of a person in good credit at the time : *Lamb* v. *Cochran* (3) ; Lord Moncreiff in *Seton* v. *Dawson* (4), followed in *Kennedy* v. *Kennedy* (5) ; and in England, *Forbes* v. *Ross* (6). In *Langston* v. *Ollivant* (7) the trustees were found liable because

(1) 14 Ct. Sess. 4th Series, 22.
(2) 12 App. Cas. 727.
(3) 20 Sco. Law Rep. 575.
(4) 4 Ct. Sess. Cas. 2nd Series, at p. 328.
(5) 12 Ct. Sess. Cas. 4th Series, 275.
(6) 2 Bro. C. C. 430 ; 2 Cox, 113.
(7) Coop. G. 33.

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their leading motive to lend was to accommodate the bankrupt from feelings of relationship.

In Scotland great stress is laid on the words of the immunity clause, although in an English will they might just as well be struck out. The Lord President (Inglis) said in *Rae* v. *Meek* (1) taking an insufficient security is one of the things the trustee is not to be answerable for. There also his Lordship said, citing Stair, 1. 12. 10, that we must not demand of a gratuitous trustee "any more prudence, or diligence, or knowledge than he actually possesses and uses in the management of his own business" (2). See also Lord Moncreiff in *Seton* v. *Dawson* (3); The Lord Justice Clerk (Moncreiff) in *Kennedy* v. *Kennedy* (4); Lord M'Laren in *Ritchie and Others* v. *Cuthbert* (5).

[LORD WATSON referred to Erskine 3. 3. 36.]

Seton v. *Dawson* (6), where *Home* v. *Pringle* (7) is cited, ought not to be carried further than the facts there warrant.

If the ground of the judgment against the appellant is negligence, then it ought not to apply to Mr. McCowan, as he died in 1880, and could not attend to the trust after 1878. [Also cited *Home* v. *Menzies* (8); *Ross* v. *Allan's Trustees* (9).]

Sir *Horace Davey*, Q.C., and *Asher*, Q.C. (of the Scotch Bar), for the respondent, not heard.

LORD HALSBURY, L.C.:—

My Lords, in this case I have come to the conclusion that the judgment of the Lord Ordinary is one which so far as it is a question of fact is very satisfactorily supported by the evidence, and, if the facts are as his Lordship found them to be, it seems absolutely impossible to controvert the legal conclusion.

Certain family trustees appear to have lent a sum of £12,000 on what they ought to have known to be a very doubtful security. It is quite possible that the trustees were only actuated

(1) 15 Court Sess. Cas. 4th Series, 1046; 25 Sco. Law Rep. at p. 744.
(2) 25 Sco. Law Rep. at p. 743.
(3) 4 Ct. Sess. Cas. 2nd Series, at pp. 328, 331.
(4) 12 Ct. Sess. Cas. 4th Series, at pp. 287, 288.
(5) 25 Sco. Law Rep. at p. 517.
(6) 4 Ct. Sess. Cas. 2nd Series, 310.
(7) 2 Robinson App. 384.
(8) 7 Ct. Sess. Cas. 2nd Series, 1010.
(9) 13 Ct. Sess. Cas. 2nd Series, 44.

by an honest desire to do what was best for the whole family, and it may be that they were quite right in endeavouring to aid and assist William Millar to become the purchaser of the property of which they had the disposition. But there was upon them the overwhelming obligation to see that the property which they disposed of to William Millar was paid for.

Now I am satisfied the trustees were or ought to have been conscious of the fact that William Millar was not in a position to pay for what he had bought; they nevertheless permitted it to be conveyed to him; they allowed him to raise £17,000 upon it and then lent him £12,000 on the property so previously charged—not in truth as an investment at all, but as a method by which he should in form pay the purchase-money of the property they had sold him.

I asked the same question as Lord M'Laren: "Why did not the trustees agree themselves to lend the £17,000 on a first bond and allow Mr. Millar to raise the £12,000 on what he offered as unexceptionable security?" They knew, or Mr. Black knew, on their behalf, that Mr. Millar could not have got the £12,000 from any source but the trust, and I have the less difficulty in arriving at the conclusion at which I have arrived when I remember that Mr. Black was, to the knowledge of the trustees, the adviser of Mr. W. Millar as well as their own. If trustees will permit such a mixture of interests to take place, they have but themselves to thank when such a misfortune as has resulted in this case overtakes them.

I think there is some evidence to shew that the trustees (I dare say from very worthy motives) had placed themselves in the position of champions of the William Millar side of the family. But I am of opinion that the loan was originally a breach of trust. I think it was not made better by the personal security that they took since. I am of opinion that the whole transaction assumes the shape of an accommodation to William Millar to buy the property and not a bonâ fide investment of the trust funds.

Under these circumstances it becomes unnecessary to consider the indemnity clause, since to such a transaction the indemnity clause has no application.

It is to my mind unnecessary to consider under these circum-

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stances the question as to the continuance of the loan in spite of warning and remonstrances. It certainly cannot make better the position of the trustees. I move your Lordships that the interlocutor appealed from be affirmed, and this appeal dismissed with costs.

LORD WATSON :—

My Lords, the testamentary trustees of the late John Millar, merchant in Glasgow, who are represented by the appellants, lent in November, 1874, £12,000 of the trust funds under their charge to William Millar, one of the seven beneficiaries entitled, in equal shares to the residue of the trust estate. That sum formed part of the price of a tenement purchased by William Millar from the trustees, which was payable in terms of the contract of sale, in May, 1874; but he was unable to pay the £12,000, and was allowed to retain it as a loan. In security of the loan, he conveyed to the trustees three house properties in Glasgow, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two-thirds of their estimated values, as stated by the borrower. Besides these margins, the trustees held the personal obligation of their debtor, whom they must have known to be impecunious, and of his father-in-law, Andrew Walker, who was engaged in trade, and of whose solvency they knew nothing beyond general repute. Notwithstanding remonstrances by the other beneficiaries interested, the money was suffered to remain on these securities until 1884, when it was discovered that the margins were utterly worthless, and both the personal obligants became bankrupt, the estimated dividend in William Millar's sequestration being 2*d.*, and in Andrew Walker's 5*s.* 9*d.* per pound.

It is not disputed that in ordinary circumstances the conduct of these trustees would have been unwarrantable, and that they would have been personally liable to make good to the trust estate the deficit occasioned by the insufficiency of the securities; but the appellants plead, that the combined effect of two clauses in John Millar's deed of trust is to relieve them of all responsibility for the loss.

By the first of these clauses his trustees are authorized and

empowered when they shall consider it necessary or expedient, to realize the trust estate, and "to lend out the proceeds and other funds of the trust, or such parts thereof as may be not otherwise required, on such securities, heritable or personal, as they may think proper." A power to lend on personal security has been held, in Scotland, to include lending on personal credit; but it must be kept in view that, in requiring some kind of security to be taken, it was the plain object of the truster to preserve intact the capital of the trust estate, for the benefit of the persons ultimately entitled to it. It appears to me that the authority to invest, which he gives for that obvious purpose and no other, cannot he construed as a license to his trustees to take a worse instead of a better security, that is to say, to accept a bare personal obligation, so long as it is possible for them to obtain a pledge of heritable or movable property. The power to lend trust money on personal credit may prove very useful to trustees who are in search of a permanent investment, but trustees who make a permanent loan on that footing must, in my opinion, if any loss results from it, justify their action by shewing that no safer investment was open to them. It would require very exceptional circumstances to warrant a loan of trust funds, continued for a period of ten years, upon no better security than the personal guarantee of two individuals, whose ability to repay was dependent upon the vicissitudes of trade.

By the second of those clauses, it is declared that the trustees "shall not be liable for omissions, errors, or neglect of management, nor singuli in solidum, but each shall be liable for his own actual intromissions only." I see no reason to doubt that a clause conceived in these or similar terms, will afford a considerable measure of protection to trustees who have bonâ fide abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust, and of the persons whom it concerns. But it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of culpa lata, or gross negligence on his part, or of any conduct which is inconsistent with bona fides. I think it is equally clear that the clause will afford no protection to trustees, who from

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motives however laudable in themselves act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. I agree with the opinion expressed by Lords Ivory, Gillies, and Murray in *Seton* v. *Dawson* (1) to the effect that "clauses of this kind do not protect against positive breach of duty."

Upon the facts of this case, I should be prepared to hold that there was crassa negligentia exhibited by these trustees. The sale to William Millar was effected on terms favourable to the trust; and having regard to the pecuniary circumstances of the purchaser, they were not in my opinion to blame for not insisting upon immediate payment of the £12,000, which might have defeated the transaction. But these very circumstances, coupled with the unsatisfactory character of the securities which the purchaser was able to give them, ought to have warned men of ordinary prudence of the necessity of obtaining payment of the money within a limited time, and of placing it on a proper trust investment. I am content however to rest my judgment upon the same view of the facts which was adopted by the Lord Ordinary and by the Second Division of the Court. I do not think it necessary to enter into the details of the evidence, which has satisfied me that, throughout this unfortunate transaction, these trustees lost sight of the primary duty which they owed to the beneficiaries interested, and were mainly actuated by a desire to accommodate William Millar, the borrower of the money.

There were two points raised in the argument for the appellants, which appear to me to deserve notice. It was seriously argued that, according to the law of Scotland, the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster) be tested by reference, not to an average standard, but to the degree of care and prudence which he uses in the management of his own private affairs. The rule, which is quite new to me, would be highly inconvenient in practice. In every case where neglect of duty is imputed to a body of trustees, it would necessitate an exhaustive inquiry into the private transactions of each individual member,—the interest of the trustee being to shew that he was a stupid fellow, careless in money

(1) 4 Ct. Sess. Cas. 2nd Series, at p. 318.

matters: and that of his opponents to prove that he was a man of superior intelligence and exceptional shrewdness. The learned counsel were unable to cite any case in which such a rule has been applied, but it was said to rest upon the high authority of Lord Stair. We were referred to a passage in that title of the Institutions which treats of Mandates (1, 12, 10), where the rule is so laid down. I venture to doubt whether it is correctly stated; but the passage relied on has reference to special and not to general mandates. The learned author carefully distinguishes between these two classes (1, 12, 15), mandates being defined by him as special or determinate, "when both matter and manner are special;" and, as general or indeterminate "when the matter is special, but when the manner is not specified." A testamentary trust to invest on such heritable or personal securities as the trustees may think proper is of the nature of a general or indeterminate mandate; and the rule which Lord Stair twice lays down in reference to that case (1, 12, 9, 15), is that the mandatar "must necessarily do what is best, secundum arbitrium boni viri, and must do the like in all indeterminate mandates."

The other point was this: it was urged that the trustees acted bonâ fide in accordance with the advice of their law agent, whose evidence was no longer available when this case went to trial. The late Mr. Knox, one of the trustees, said in his evidence, "we were entirely guided by him," and another of them, Mr. Gavin Miller, on his attention being called to the hazardous nature of the transaction, stated "we were acting on the advice of our law agent, and we considered we were perfectly safe." The agent, upon whom they then relied, was not only acting for the trust, but on behalf of William Millar, their borrower, and the fact of his double agency was well known to the trustees. Assuming that in the conduct of his own affairs a man may, if he chooses, trust to the advice of an agent in that position, I am very clearly of opinion that no one clothed with a fiduciary character is justified in perilling the interest of his cestuis que trust upon such partial advice. I have not found it necessary to take that circumstance into account in deciding the present case: had it been necessary to do so, any inference which I could have derived from it would have been unfavourable to the appellants.

H. L. (Sc.) 1888 KNOX v. MACKINNON.

I concur in the judgment which has been moved by the Lord Chancellor.

LORD FITZGERALD :—

My Lords, I concur in thinking that the interlocutor of the Lord Ordinary, adopted by the Second Division of the Court of Session, should now be affirmed, for the reasons given both by the Lord Ordinary and in the Court of Session. In the very able and elaborate judgment of my noble and learned friend opposite (Lord Watson), there are some additional propositions on which I do not find it necessary to express any opinion.

LORD MACNAGHTEN :—

My Lords, I quite agree. Notwithstanding the able argument of Mr. Rigby and Mr. Dickson, I cannot say that I have felt any doubt as to the propriety of the interlocutors under appeal.

Any system of trusts which did not require trustees to act with perfect impartiality as between their cestuis que trust and to bring to the management of trust affairs the same care and diligence which a man of ordinary prudence may be expected to use in his own concerns, would be illusory and mischievous. Tried by this standard, the conduct of the defenders falls far short of what is required by law and common sense. The transaction which has led to the loss stands condemned, whether it be regarded as a sale of trust property or as an investment of trust funds, or as a combination of both. No man of ordinary prudence would, I think, have sold his own property on the terms upon which the defenders disposed of the property committed to their charge. The property seems to have been readily saleable at the time: yet the trustees were satisfied to part with the legal dominion over it for about half its value in cash, taking for the balance a parcel of securities of the most shadowy and unsubstantial character. No man of ordinary prudence would have thought of investing £12,000 of his own on these so-called securities. No man of ordinary prudence would have entered into the arrangement regarding it as a whole, unless his first object had been to assist Mr. William Millar—and help him to become owner of his business premises.

It was said that the price was a very high one, and that it was greatly to the advantage of the trust estate that the transaction should be carried through even at some risk. There is no evidence that the sum which Mr. William Millar offered was more than might have been got in the open market. But assuming that the price was high and that it was important to secure it, that did not justify the trustees in parting with the substance in a great measure for a mere shadow. If the trustees were really desirous of carrying the transaction through for the benefit of the trust estate, one would certainly have expected to find that they would have required payment by instalments, or at least have insisted on Mr. William Millar reducing his debt while his affairs still continued prosperous.

It is impossible I think not to see that the trustees did unduly favour Mr. William Millar. They seem to have been led aside from the strict path of duty by two things. They appear to have thought, rightly or wrongly, that the second family were trying to put an unfair pressure on Mr. William Millar, and so they paid no attention to remonstrances in themselves reasonable. And they allowed their judgment to be guided or warped by the opinion of a gentleman who was acting or professing to act as their law agent, but who was also to their knowledge the law agent of Mr. William Millar, and whom therefore they ought not to have consulted on this question.

On the whole I have no hesitation in agreeing with the Lord Ordinary and the Second Division of the Court of Session that the £12,000 was lent to Mr. William Millar upon unsubstantial and insufficient security contrary to the law and practice of trust administration.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, 7th August, 1888.

Agents for appellants: *Clarke, Rawlins, & Co., for C. & A. S. Douglas, W.S., Edinburgh, & M'Grigor Donald & Co., Glasgow.*

Agents for respondent: *Freshfields & Williams, for Donald Mackenzie, W.S., Edinburgh; and Mitchells, Cowan & Johnston, Glasgow.*

[PRIVY COUNCIL.]

J. C.* 1888 June 19.

ROLLAND . . . . . APPELLANT;

AND

CASSIDY . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

Arbitration—C. C. P. art. 1346—*Duties of Amiables Compositeurs.*

Arbitrators who are also appointed amiables compositeurs may, under art. 1346 C. C. P., dispense with the strict observance of those rules of law the non-observance of which as applied to awards results in no more than irregularity; they cannot be arbitrary in their dealings with the parties or disregard all law.

Where such arbitrators in good faith obtained from one of the parties in the absence but to the knowledge of the other correct information as to the law bearing upon the case before them, *held*, that that was not an irregularity which vitiated the award.

APPEAL from a decree of the Court of Queen's Bench (March 27, 1886), affirming a judgment of the Superior Court for Lower Canada, District of Montreal (Jan. 30, 1884), in two consolidated actions.

In the first action the appellant sued to set aside an award and for an account; in the second the respondent sued to enforce the award and to recover the amount awarded, viz., $11,094. The facts of the case appear in the judgment of their Lordships. The Courts below decided in favour of the validity of the award, holding that the appellant had failed to prove any violation of the conditions of the compromis (submission) or any irregularities by the arbitrators.

Lumley Smith, Q.C., and *Archambault*, Q.C., of the Canadian bar, for the appellant.

Sir *Horace Davey*, Q.C., *Lacoste*, Q.C., and *Fullarton*, for the respondent, were not called upon.

* *Present*:—THE EARL OF SELBORNE, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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CASSIDY.

The judgment of their Lordships was delivered by

THE EARL OF SELBORNE:—

Their Lordships do not think it necessary in this case to call upon the counsel for the respondents.

The question arises under a reference to arbitration of the accounts of a partnership constituted in the year 1874, for the purpose of certain speculations in lumber of which either the whole or a considerable part had been previously bought by the co-partners.

The only articles of the partnership material for their Lordships to consider are the second and the third. By the second article (the partnership being originally of three, and afterwards by the insolvency and death of one reduced to two), one of the partners, the present appellant, Jean Baptiste Rolland, was made the sole gérant—that word is not used in the article—or administrator of the partnership, in these terms:—"All the affairs and transactions of the partnership shall be carried on and conducted by the said partners together, and by common agreement, under the form of Rolland & Co., by the management of Rolland (one of them), who alone shall have the agency and the active administration of the entire affairs of the concern, employing under his immediate control one or more salaried persons, as guardians of the place, sellers and receivers of the wood of the said partnership. The expenses of the agency or the commission of the said Rolland shall be left to the decision of his co-partners." It was said that they might possibly have exercised that discretion, by not paying him; but it is clear he was meant to have a fair and reasonable commission; and in the course of the arbitration he has had the benefit of that stipulation. That article distinctly made him the agent of his co-partners for the purpose of sole control and sole administration; and as to payment, he was to receive a commission. And, further, the next article shews that the wood which at that time had been bought, and their Lordships assume what was afterwards bought also, was deposited upon three closes of land belonging to him. Nothing indeed is expressly said in that article about the payment of rent; but he claimed, and it was agreed on all hands that he was

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entitled to, rent for the occupation by the partnership of those closes of land belonging to him on which the wood of the partnership was placed. Upon that the only question of law which could arise, as it seems to their Lordships, was, not whether the account was to be taken upon the footing expressed in a passage of Mr. Justice Monk's opinion, of a simple agent instead of a partner, but whether it was to be taken on the footing of agency as between himself and his co-partners as well as with reference to his rights as a partner. Taking the question so, their Lordships imagine that it would be impossible in any country to construe such words, or to act upon such a provision, except as holding him responsible to his co-partners upon the footing of agency and administration for their benefit; at the same time that beyond all doubt he was entitled to all the rights of partnership. That seems perfectly clear.

Well, the partnership is carried on for some years, and it ends in disputes as to the accounts, and a reference to arbitration, out of which the present question arises. It is not immaterial, that by the deed of submission to arbitration the arbitrators were expressly to act as amiables compositeurs; they are characterised by the same words more than once, as "arbitrators and amiables compositeurs." What is the force and meaning of that expression "amiables compositeurs" by Canadian Law? We find it in the 1346th article of the Code of Civil Procedure: "Arbitrators must hear the parties, and their respective proofs, or establish default against them, and decide according the Rules of Law, unless they are dispensed from so doing by the terms of the submission, or unless they have been appointed as 'amiables compositeurs.'" That is to say, if they are amiables compositeurs, they are to be exempt at all events from the strictness of the obligations expressed in the previous words: "The arbitrators must hear the parties, and their respective proofs, or put them into default, and judge according to the rules of law." Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as amiables compositeurs to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to

the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity.

Bearing those facts in mind, their Lordships must consider what actually took place, and what it is that is complained of. The arbitrators came to a decision after many meetings, and made an award in which they have stated very fully the questions which they examined, and the view they took of them, the result being that a certain sum is found due upon the result of the account from the present appellant to the firm. It is admitted, or at least it cannot be controverted, having regard to the terms of the Code, that it is not for their Lordships to perform the office of the arbitrators with regard to the merits, or to take the accounts, and exercise their judgment upon all the questions which were referred. Their Lordships must consider whether anything is shewn to have been done which vitiates the award. And in point of fact, from the numerous grounds of objection to the award which are printed in the judgment of Mr. Justice Cross, it is manifest that the appellant's case as against the award proceeds not upon the merits, not upon any attempt to ask the Court to go into the accounts and review the decisions which the arbitrators came to, but upon the allegation that as to various matters they conducted themselves irregularly or improperly in the performance of their duty; that is the sole question which their Lordships have to consider.

What, then, is the ground of this appeal? That upon the questions of law, or question—for it really comes to a single question—as to the footing on which, under this partnership deed, Mr. Rolland was to account, they received or took, and may be presumed to have been influenced by, certain legal opinions, taking or receiving them in a certain manner, which appears by the evidence.

The facts, shortly stated, seem to be these. In this, as in many other cases of arbitration, there was some appearance of a greater degree of zeal on the part of the arbitrators nominated by the parties for those who nominated them than in the abstract might be desired. One of the arbitrators was named by Mr. Rolland; another was named by Mr. Cassidy, his opponent, and

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the third was named by the two. It appears by the judgments of the Court below that these gentlemen were well known, and were perhaps the best arbitrators, for a case of this kind, who could have been obtained; and being amiables compositeurs, and not bound to proceed with strict form and regularity in everything, though they were, as their Lordships assume, bound to proceed according to the substantial rules of justice, they desired to know, in the first instance, whether the position of gérant or administrator, under the article which has been read, made it proper to treat this gentleman, Mr. Rolland, not as a simple partner, but as an accounting party to his partners upon the footing of the agency primâ facie constituted by the second article. They wanted to know whether the law was one way or the other about that. One of them, M. Tourville, the arbitrator named by Mr. Cassidy, he, or Mr. Cassidy, or both of them together, went to a lawyer, Mr. Lacoste, whom Mr. Cassidy had been accustomed to consult as his legal adviser in this and other affairs, and to whose standing and character M. Archambault has this morning borne testimony honourable to both gentlemen. Mr. Lacoste's character was above reproach or suspicion. That he was a gentleman whom, both in this business and in other matters of business, Mr. Cassidy had consulted, was perfectly well known to everybody; and it appears quite clearly, that not Mr. Ward and M. Tourville, as Mr. Justice Monk erroneously assumed in his opinion, but either Mr. Cassidy or M. Tourville for Mr. Cassidy, went to Mr. Lacoste to obtain his opinion upon the question or questions of law which were supposed to lie upon the threshold of the case, and which did in fact lie upon the threshold of the case. That opinion, signed, was obtained, with the accession to it of the opinion of another gentleman, an advocate, Mr. Béique. As to him also, Mr. Justice Monk appears to have thought that there was some evidence shewing that Mr. Ward and M. Tourville had intervened. There is no evidence of the kind. Their Lordships will deal with the case upon the assumption that M. Tourville individually did intervene: but that is a different thing from the intervention in that matter of two of the three arbitrators, constituting a majority. That opinion was obtained by or for Mr. Cassidy without any concealment; it

appears on the face of the opinion that it was given on his behalf; it was produced, according to the evidence, to all the arbitrators. According to the evidence it was clearly spoken of and discussed between them all.

It may be right to refer to one or two passages in the evidence which make those facts with regard to that opinion perfectly clear. In the evidence of M. Tourville, which was referred to by M. Archambault for the appellant, he is asked the question:—"*Q.* That opinion of M. Lacoste was given at the commencement of the inquiry?—*A.* Yes. *Q.* Was it to you that it was sent?—*A.* I am not sure. I cannot precisely say. *Q.* Was it not Mr. Cassidy who sent it you?—*A.* I cannot say. I know it was sent." Then he repeats that it was communicated at the beginning of the inquiry. "We received the communication"—"we" evidently referring to all the arbitrators. "We read it. We often spoke of it before Messrs. Ward and Grier. I cannot say whether all the arbitrators read it through. I know that they had knowledge that it was on the table." Then he is asked whether Rolland knew it. He says, "Rolland saw it himself. It was before us all; and he was present at the meetings." Not only is it clear from this evidence of M. Tourville that Rolland did see it, but there is further evidence. When Mr. Grier, Rolland's own arbitrator, was examined by his own counsel, he was asked this question:—"Did not Mr. Rolland tell you in the presence of Mr. Cassidy that he wished to bring Mr. Taillon as a witness before you, on account of the opinion given by Mr. Lacoste and filed by Cassidy?" The answer of Mr. Grier, his own arbitrator, is:—"I cannot remember all the conversation in detail that went on there, but I remember that that was the purpose for which Mr. Rolland brought Mr. Taillon." It was therefore the act of Mr. Cassidy, the known act of Mr. Cassidy, known by everybody, to bring this opinion before the arbitrators as an opinion given on his behalf, by the two gentlemen who subscribed it upon that question of law; and this at all events was perfectly well understood by Mr. Rolland, who in consequence of it produced two other opinions on his own behalf, which are upon the record, opinions of the lawyers whom he consulted. So far as that first opinion is concerned, the only thing which can be called

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irregularity was the intervention of M. Tourville, one of the arbitrators. Everything was perfectly above-board; it was done for a reasonable and proper purpose, and everybody, Rolland included, knew and understood it.

Well, then, next comes the question whether that was an erroneous opinion in point of law? It has not been seriously argued that it was, for it affirms nothing more than what their Lordships have already said, and what seems to them to be quite clear upon the terms of the deed of partnership, that this gentleman was answerable for the property which came into his custody on behalf of the firm; and being answerable for that, being paid rent for the place in which it was deposited, being paid a commission for his care and administration of it, he was primâ facie chargeable with the quantity of the goods which he admitted having received; and there being a large and important deficiency of no less than 10 per cent. on the whole quantity, he had to explain that in some manner consistent with his duty as agent. If it was not received, primâ facie he was accountable for not having taken care that it was received. If it was received he must explain how it was that thus being in his custody, and under his administration, it has disappeared; and it ought not to be charged as a loss to the partnership except so far as after explanations upon proper evidence it may appear that he is not responsible for it upon the principle applicable to a fiduciary agent for his co-partners. The opinion went no further than that. It did not prejudge the question on the evidence. It proceeded upon a statement made by or for Mr. Cassidy upon the matters of fact, and upon those assumptions stated conclusions of law which in their Lordships' opinion were sound and correct.

Then what afterwards happened? It may be said, and their Lordships think it is true, that it would be prudent and discreet far arbitrators, when they desire to put themselves upon the best possible footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentlemen whom they may see upon that subject. But if they cannot be shewn to have acted with improper partiality, or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law, and if they cannot be shewn to have

been misled as to the law, it seems an extraordinary thing—their Lordships would be inclined to think so even in the case of an ordinary arbitration, but certainly when they were acting under this particular law as amiables compositeurs—a most extraordinary thing, if they having judged rightly in law, having been rightly advised as to the law, and having taken all the steps which they did take for the sole purpose of getting correct information as to the law, that should be a ground for setting aside the award. What the evidence shews, in point of fact, is that Mr. Ward placed more confidence in another gentleman, Mr. Greenshields, who was supposed in the first instance to have expressed an opinion more or less at variance with that of Mr. Lacoste. What could be more reasonable, if those two gentlemen were willing to meet and confer together, than that they should do so; and unless there was something else wrong, the arbitrators were not upon any conceivable principle wrong in seeking to bring those gentlemen together and learn what the result was. This was done, and, according to the evidence, quite uncontradicted, when Mr. Greenshields met Mr. Lacoste, the apparent difference of opinion disappeared, and they agreed in the substance of Mr. Lacoste's opinion. Then afterwards, the appellant being still dissatisfied, the arbitrators consulted two other gentlemen, M. Trenholme, as to whom not a word is said as to the manner in which his opinion was obtained, and M. Laflamme, and they also were found to agree. All those opinions agreed, they were all right, and their Lordships agree with them. What is it then which remains? Why, that Mr. Cassidy upon two of those occasions, when Mr. Greenshields and Mr. Lacoste met, and when M. Laflamme was consulted, was present, and the meetings took place at his office; but Mr. Cassidy and the other witnesses say that not only did he not by word or otherwise interfere, but he desired to withdraw, and he was told it was not necessary; and he said nothing, and did nothing which could practically influence anybody; although it would have been more discreet that they should hold no communication with anybody in his presence when the other party was not also present. Yet if it is clear that it was only a legitimate communication, perfectly in good faith, bearing only upon the point of law, and resulting in nothing

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except correct information about the law—the law not seriously disputed even now before their Lordships' Board—it would appear to their Lordships to be wrong and unreasonable to set aside an award by arbitrators of this character on those grounds—a mere mistake or error of judgment in a matter not affecting the law of the case, not affecting the facts of the case, not affecting the justice of the case, and under a reference to amiables compositeurs.

Their Lordships therefore do not think it necessary to go into the question whether with regard to those subsequent communications there was sufficient knowledge of them on the part of Mr. Rolland to bind him upon the footing of acquiescence because he afterwards went on with the arbitration, or to justify the inference that these were among the irregularities referred to at the end of one of his memoranda, and which he there appeared willing to waive. Their Lordships, until they had heard the other side, would rather assume the contrary; because the burden of proving a case of waiver and acquiescence is upon the person who suggests it; and their Lordships wish it to be distinctly understood that they base no part of their judgment upon that ground. They are satisfied indeed that Mr. Rolland was well aware of the original opinion given by Mr. Lacoste, and the other gentleman, M. Béique, that he knew it had been laid before the arbitrators, and had the fullest opportunity of producing the opinions on his own side which he did produce. To that extent they are satisfied, not that there was a case of acquiescence, but that there was knowledge, and that nobody was misled. It was not a consultation by the arbitrators which was at all irregular; it was an opinion which Cassidy, as a party, brought before the arbitrators to the appellant's knowledge. The subsequent communications of the arbitrators with the legal gentleman may not have been known to him; their Lordships do not proceed upon the supposition that they were, or that any objection founded upon them was waived; but their Lordships are of opinion that there was nothing substantially wrong in those communications, though there may have been an error in judgment in holding them to any extent whatever in Mr. Cassidy's presence when the appellant was not present.

With regard to the opinions which have been given by the learned judges, their Lordships think that perhaps it may be expedient to make one or two observations. The opinion given at the time by Mr. Justice Cross, in which, as their Lordships understand, all the members of the Court, except Mr. Justice Monk, then concurred, appears to their Lordships to be altogether right, and to put the case substantially upon its proper grounds. It is not quite a satisfactory thing that at a later stage other judgments should be written by those who at the time concurred without delivering separate opinions, which may appear to suggest different grounds, especially when those opinions were not sent over with those upon the record. The judgment of Mr. Justice Monk appears to their Lordships to proceed upon erroneous views of the effect of the evidence, both as to the conduct and bona fides of the arbitrators, and also as so the manner in which the first opinion of Mr. Lacoste was obtained; and it appears to them that those errors deprive that judgment of the weight which otherwise might have been due to it.

On the whole case their Lordships will have no difficulty in advising Her Majesty that the appeal ought to be dismissed, and the judgment appealed from affirmed with costs.

Solicitors for appellant: *G. S. & H. Brandon.*
Solicitors for respondent: *Simpson & Co.*

[PRIVY COUNCIL.]

J. C.* 1888 July 26.

ALLAN AND OTHERS . . . . . DEFENDANTS;

AND

PRATT . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, LOWER CANADA.

Practice—Right to appeal—Decree below the appealable Amount.

The measure of value for determining a defendant's right of appeal is the amount which the plaintiff has recovered; where this falls short of the appealable amount, the Court below cannot give leave to appeal. Where such leave has been erroneously given, the appeal will be dismissed, and an opportunity to apply for special leave will not be granted unless the circumstances are such as to render it desirable.

APPEAL from a decree of the Court of Queen's Bench (March 18, 1887) affirming a judgment of the Superior Court for Lower Canada sitting at Montreal (Dec. 20, 1884).

The earlier judgment was to the effect that the accident of which the plaintiff complained, and in respect of which he sued under Civil Code, arts. 1053, 1054, to recover $5000 damages, was caused by the fault of defendants' men, under whom the plaintiff was working, and awarded $1100.

The case in appeal is reported in 3 Montreal L. R. p. 8. An appeal to Her Majesty in Council was admitted in the Court of Appeal, after mature deliberation, and after the parties had been heard by their counsel respectively.

The question as to the validity of the order admitting the appeal was first argued before their Lordships.

Fullarton, for the appellants, contended that the order was right. He referred to *Ritcher* v. *Voyer* (1); *Joyce* v. *Hart* (2); *Macfarlane* v. *Leclaire* (3); *Sauvageau* v. *Gautier* (4). If the

* *Present:*—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, and SIR BARNES PEACOCK.

(1) 2 Revue Légale, 244.
(2) 1 Sup. Court Can. Rep. 321.
(3) 6 Low Can. Jur. 170; 15 Moore, P. C. C. 181.
(4) 12 Low. Can. Rep. 154; Law Rep. 5 P. C. 494.

order was erroneous, there was power to grant special leave nunc pro tunc, and such leave should be granted under the special circumstances of this case.

The respondent did not appear.

The judgment of their Lordships was delivered by

THE EARL OF SELBORNE :—

Their Lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the question of the right of appeal is, in their judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of *Macfarlane* v. *Leclaire* (2), that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do something as defendant. It may be that the value to the defendant of an adverse judgment is greater than the value laid by the plaintiff in his claim. If so, which was the case in *Macfarlane* v. *Leclaire* (1), it would be very unjust that he should be bound, not by the value to himself but by the value originally assigned to the subject-matter of the action by his opponent. The present is the converse case. A man makes a claim for much larger damages than he is likely to recover. The injury to the defendant, if he is wrongly adjudged to pay damages, is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side.

Therefore in principle their Lordships think the case is governed by *Macfarlane* v. *Leclaire* (1), upon the question of value, and they do not think it is at all affected by the circumstance that

(1) 15 Moore, P. C. C. 181.

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the Court below did not give effect to that objection, but gave leave to appeal. It has been decided in former cases that leave so given does not make the thing right, if it ought not to have been done.

Then it is submitted by the learned counsel that their Lordships ought to give an opportunity for an application to be made for special leave to appeal, on the ground that not only questions of fact but also, as bearing on those facts, questions of law, and particularly a question of law which may be important, upon art. 1054 of the Civil Code, are involved in the case. Of course their Lordships will not at present go into the merits of the case at all, and they will assume that there may be such a question and that it may be important; but the present question is, whether, this appeal being incompetent, they ought to give, under the circumstances of the case, an opportunity of asking for special leave to appeal. No doubt there may be cases in which the importance of the general question of law involved may induce their Lordships to give leave to appeal, though the value of the matter in dispute is not sufficient; but their Lordships must be governed in the exercise of that discretion by a consideration of all the circumstances of each particular case. In this case they see from the manner in which it comes before them that this general question of law, if allowed to be argued on appeal, would be argued at the expense, if he did appear and go to any expense, of a man evidently too poor to undertake it. And, secondly, they see that there would be no probability whatever, if they permitted such an appeal, of their Lordships having the assistance which they must necessarily desire, whenever an important question as to the construction of an article of the Civil Code, having so large a bearing as this is suggested to have, may require to be considered and determined by them. If in any future case a similar question should arise, and should be competently brought before their Lordships, no doubt it will be decided upon its merits and not held to be finally concluded by the judgment given in this particular action. Their Lordships do not think it would be at all a satisfactory thing to allow an appeal not otherwise competent for the sake of raising in those circumstances and in that manner a question of the importance

which this question is said to have. Therefore the appeal will be dismissed; but, as nobody has appeared to oppose it, there will be no costs.

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Solicitors for appellants: *Hewlett & Preston.*

[PRIVY COUNCIL.]

LEWIN . . . . . PLAINTIFF;

AND

KILLEY AND OTHERS . . . . . DEFENDANTS.

J.C.* 1888 *July* 27.

ON APPEAL FROM THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN (STAFF OF GOVERNMENT DIVISION).

Construction of Will—Die without leaving lawful Issue.

Where a testator, after making particular dispositions during the lifetime of his widow, and certain absolute dispositions in favour of his children to be effected by conveyance from the trustees of the will at her decease, directed that "if any of my said children shall die without leaving lawful issue them surviving the property hereby devised and bequeathed to each of my said children shall be equally divided amongst my surviving children":—

Held, that, according to the whole scope and intention of the will, the time of dying without lawful issue was confined to the time before the grant of the absolute interest, that is during the lifetime of the widow; and that after conveyance of the absolute interest, no defeasance was contemplated.

APPEAL from a judgment of the Staff of Government Division of the High Court (April 27, 1887) affirming with variations a judgment of the Chancery Division of the said Court (June 4, 1886).

The question in the appeal was whether upon the true construction of the will of James Lewin an executory gift over of the property devised to each of his children, in the event of a child dying without issue, is to be restricted to the death of the devisee without issue in the lifetime of the testator's widow, who

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR JAMES HANNEN, and MR. S. WOULFE FLANAGAN.

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took a life interest in certain parts of his property, or whether the gift over took effect upon the death of the devisee without issue, whether before or after the testator's widow. The question arose upon the construction of a devise of a house, No. 4, Marina Terrace, Douglas, in the Isle of Man, with certain stabling attached thereto, in favour of the testator's daughter, Grace Eleanor Lewin.

Theobald, for the appellant, contended that it was a settled rule of construction that in the absence of a contrary intention a gift over upon death without issue, whether following a prior life estate or not, means death without issue at any time. In this will there was no indication of intention sufficient to take the case out of the ordinary rule. On the contrary, so far as any indications of intention exist, they support the application of the rule. In some of the directions in the will it was impossible to limit the gift over to death without issue during the lifetime of the widow, and one uniform rule of construction should be observed throughout. Reference was made to *O'Mahoney* v. *Burdett* (1) and the cases there cited.

Ring (of the Manx bar) and *R. W. Harper*, for the respondent, C. S. Lewin, were not called on.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The question in this case arises on a gift by the testator, James Lewin, of a house, No. 4, Marina Terrace, and the gift is of this nature: The house was subject to a rent payable to one Maria Stewart, but that may be thrown out of consideration, because Maria Stewart is dead. Subject to that rent the testator gave the house to trustees upon trust to permit his wife to receive half of the rents and profits for her life, and his daughter Grace the other half. Upon the decease of the wife the trustees were directed to transfer and convey the house to Grace, her heirs and assigns, for ever. Then follows this direction: "And it is my will and desire, that if any of my said children shall die without

(1) Law Rep. 7 H. L. 388, 392.

leaving lawful issue them surviving, that the property hereby devised and bequeathed to each of my said children shall be equally divided amongst my surviving children." The events that have happened are, that the wife has died, Grace survived the wife many years, and she has died without leaving lawful issue her surviving. The question is whether the property goes to her heir, or is governed by the proviso that has just been read, and is carried over to the surviving children. The appellant, David Duncan Lewin, is the only surviving child. He contends that Grace having died without leaving lawful issue, the proviso must be read according to the most general and literal effect of its terms, and that the property is carried over to him. The principal respondent, who is the heir of Grace, contends that the event of dying without leaving lawful issue surviving is confined to death before the time at which the testator contemplated that the absolute interest was to take effect.

Their Lordships think, although such provisoes as these are capable of a great deal of argument, and in some cases present points very difficult to decide, that in this case the scheme of the will does not permit of any reasonable doubt. The testator had a number of houses, and as to one he made an immediate absolute gift to one of his sons. The others he gave to trustees, and he contemplated that the trustees should for a period pay the rents to, or permit the rents to be received by, some person—some of his children, or his widow, child, or grandchild, as the case may be, for life; and when that period came to an end, then the trustees were to transfer and convey the house in question to the person for whom it was designed. They were to divest themselves completely of their trust and vest the property completely in the persons for whom the house was designed. When the period arrived at which they were to transfer and convey, they might find themselves in the presence of a change of circumstances. If the person for whom the house was designed was then dead without leaving lawful issue, they were to convey the property among the surviving children. But if the person for whom the house was designed was living, or had issue, then the conveyance would be to that person, or the heirs and assigns of that person. Their Lordships think that that is the whole scheme

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of the will, and that this testator did not design that the property should be absolutely conveyed by the trustees to any one of his children, and yet at that child's death, if he happened to die without leaving issue, there should be a defeasance of that conveyance, so that the property should pass to the surviving children.

Now two arguments have been put forward to contravene that view of the scheme of the will. One is that in the case of one house—a house in Great Nelson Street—it is given to three successive life owners; that is to say the trustees are to permit those three persons to receive the rents and profits of the house for their lives, and then upon the decease of the third, who is the grandson of the testator, they are directed to transfer and convey the said house "unto such of my children as shall be then alive." The argument is that as the conveyance was to be to the children alive at the death of the grandson George Macdonald, it is impossible to apply to the case of all the gifts the principle that the time of death without leaving lawful issue should be confined to the life of the widow. It may be so, but the principle is that the time of dying without leaving lawful issue is confined to the time during which the absolute interest has not been conferred, but when that is once conferred the trust and the period of suspense is closed, and the possession is not to be disturbed. According to the contention of the appellant, the trustees would have to convey the house in Great Nelson Street to the children alive at the time of the death of George Macdonald, and yet if any of those children died without leaving issue, then there would be a defeasance of the conveyance, and the house would go over to the surviving children. That raises in fact just the same question as their Lordships have to decide in respect of the house No. 4 Marina Terrace, and it appears to them that precisely the same scheme of disposition applies to both cases.

Another argument was that the gift to Robert Kerr Lewin, which is the only gift of a house expressed to take effect absolutely at the death of the testator, is subject to the same gift over as those other houses which are given to trustees in the first instance, and only given absolutely through the medium of the

directions to convey; and it would be absurd to apply to the gift to Robert Kerr Lewin the principle that the time of dying without leaving lawful issue was the death of the widow. Their Lordships think that there is no reason to hold that the gift over applies to any property excepting that which was given to trustees, and which they were to hold for a time for persons for life, with a direction to convey and transfer absolutely when those life estates ended. It would be extremely absurd and unreasonable to suppose that the legacies of shares, the legacies of money, and the gifts of the residue—which would fall within the general words of the proviso in question just as much as the house given to Robert Kerr Lewin would fall to him—it would be very absurd and unreasonable to suppose that he intended all those gifts to be suspended as to the full enjoyment of them until the death of the legatee to whom they were given, and until the ascertainment of the question whether or no he died without leaving lawful issue. Their Lordships think therefore that their views as to the scheme of the will are not at all displaced by those two particular contentions; on the contrary they are strengthened by the examination of the nature of the gift of the house in Great Nelson Street.

All they have to say with respect to the authorities which were cited before them is that they conceive the present decision to be entirely in accord with them, and that the judgment of the First Deemster took the right view of the authorities, and rightly applied them to the construction of this will.

The result is that this appeal fails, and their Lordships will humbly advise Her Majesty to dismiss it with costs.

Solicitor for appellant: *T. Webster.*

Solicitors for respondent C. S. Lewin: *Johnston, Harrison, & Powell.*

[PRIVY COUNCIL.]

J. C.* 1888 July 27, 31.

SINGLETON, DUNN & Co. . . . . PLAINTIFFS;

AND

KNIGHT AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Law of Partnership—Power of Partners—Civil Code of Lower Canada, arts. 1831, 1855.

One of three partners lent money on terms that the borrower, besides paying interest, should make over one half his profits to the firm to which the lender belonged:—

Held, that this agreement did not constitute a partnership between the firm and the borrower. One partner has no authority from the other partners to enter into a partnership with other persons in another business.

APPEAL from a decree of the Court of Queen's Bench (Feb. 4, 1887) affirming a judgment of the Superior Court for the Province of Quebec (Feb. 8, 1886).

The facts are stated in the judgment of their Lordships.

Both Courts below held that no partnership had been proved between Knight, the debtor to the plaintiffs, and the firm of Cook & Brothers, and therefore dismissed the suit.

Bompas, Q.C., and *Irvine*, Q.C. of the Canadian bar (*J. C. Graham* with them), for the appellants, contended that at least they were entitled to judgment against the respondent, George Josiah Cook. It was proved that he either originally assented to or subsequently ratified an agreement between James William Cook and Knight, which in law constituted a partnership between himself and Knight. George Josiah knew of the loan made to Knight, and consented to it. He read the agreement, which contained terms amounting to a partnership, and ratified it. It followed that he was bound by it, his brother having thereby

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and MR. S. WOULFE FLANAGAN.

purported to bind the firm of Cook & Brothers. He therefore is liable, whether John Larkin Cook assented to or ratified the agreement or not, and he is bound by virtue of his own assent or ratification, independently of whether his brother had power to bind him as acting in the matter within his authority as partner. Reference was made to *Pooley* v. *Driver* (1); *Ex parte Delhasse, In re Megevand* (2); *French* v. *Backhouse* (3); *Prince* v. *Clark* (4); *Cairnes* v. *Bleecker* (5); Civil Code of Lower Canada, arts. 1831, 1854, 1855.

Sir *Horace Davey*, Q.C., and *Fullarton*, for the respondents George Josiah Cook and John Larkin Cook, were not called upon.

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July 31.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec, appeal side, affirming a judgment of the Superior Court by which the action of the plaintiffs, the now appellants, was dismissed with costs. There are, therefore, two concurrent judgments upon the question at issue between the parties.

The suit was brought in September, 1882, and the plaintiff's charge was: "That in and since the year 1869 the defendants Alfred Frederick Augustus Knight, George Josiah Cook, and John Larkin Cook, and the late James William Cook, in his lifetime, the said Messrs. Cook trading under the name, style, and firm of Cook & Brothers, carried on business at Quebec as timber merchants, in copartnership, under the name, style, and firm of A. F. A. Knight." The declaration also stated that James William Cook had died, and that certain persons were by his will appointed as his executrix and executors, and then it proceeded to state "That the said executrix and executors took possession of the said estate under the said will, and after the death of the said James William Cook, the said business and

(1) 5 Ch. D. 458.
(2) 7 Ch. D. 511.
(3) 5 Burrows, 2728.
(4) 1 B. & C. 186.
(5) 12 Johnson's N. Y. Sup. Court Rep. 300.

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copartnership of the said Alfred Frederick Augustus Knight, George Josiah Cook, John Larkin Cook, and James William Cook, trading under the name and firm of A. F. A. Knight, was continued and carried on with the legal representatives of the said James William Cook until the year 1877." So that the charge was that the partnership between Knight, James William Cook, George Josiah Cook, and John Larkin Cook was also continued with the addition of the executors of James William Cook in his place, and that they were also partners. Then it stated that "the said defendants Alfred Frederick Augustus Knight, George Josiah Cook, and John Larkin Cook were, together with the legal representatives of the late James William Cook," indebted to the plaintiffs in certain sums of money.

The ground upon which it was contended that George Josiah Cook and John Larkin Cook had become liable as partners with Knight was that James William Cook, who was a partner with George Josiah Cook, and John Larkin Cook, in the year 1869 lent to Knight a sum of $100,000 for the term of five years, upon condition that Knight was to pay 6 per cent. interest for the money advanced, and also that the firm of Cook & Brothers should receive one half of the profits of Knight's business. The contract itself was not produced, but evidence was given by George Josiah Cook and other witnesses, from which it may be assumed for the present purpose that a contract was proved to have been entered into by James William Cook to the effect already stated.

Both the Courts dismissed the plaintiff's claim upon the ground that, even assuming the alleged contract to have been executed by James William Cook, George Josiah Cook and John Larkin Cook were not bound by it, as one partner in a business has no authority from the other partners to enter into a partnership with other persons in another business. It was contended that George Josiah Cook had ratified the agreement, and that he, if not John Larkin Cook, had become liable as a partner. The Courts found that George Josiah Cook had not ratified the agreement; and that, even if he had ratified it, it did not bind him to a partnership such as that which was alleged in the

declaration, or such as would make George Josiah Cook liable as a partner with Knight and James William Cook. If George Josiah Cook ratified the agreement, it was only an agreement by which James William Cook, George Josiah Cook, and John Larkin Cook, were jointly to participate in the profits of Knight; they were not by reason of that agreement jointly liable, because one of them, John Larkin Cook, at all events, had never ratified or entered into the agreement, or ever authorized James William Cook to enter into it on his behalf.

It is contended now that, even though John Larkin Cook was not liable, a decree may be given against George Josiah Cook, because he had ratified the agreement. There is no sufficient evidence, in their Lordships' opinion, to shew that George Josiah Cook ever did ratify the agreement. One of the sections of the Civil Code of Lower Canada was cited, No. 1831, to shew that participation in profits creates an obligation to participate in losses. The section is:—"Participation in the profits of a partnership carries with it an obligation to contribute to the losses. Any agreement by which one of the partners is excluded from participation in the profits is null. An agreement by which one partner is exempt from liability for the losses of the partnership is null only as to third persons." In the present case there was no participation in the profits; no one of the partners of Cook & Co. received any portion of the profits of Knight's business, and Knight never treated Cook & Co. as partners nor ever rendered them an account of the profits. He rendered merely an account of the loan and of the six per cent. interest.

But the Code of Lower Canada does not stop at section 1831. It proceeds to point out in Chapter II. what are the obligations and rights of partners among themselves, and shews what, even if they had received the profits, would have been the rights and obligations of the Cooks as between them and Knight? Chapter III. speaks of the obligation of partners towards third persons; and section 1855 proceeds:—"A stipulation that the obligation is contracted for the partnership binds only the partner contracting, when he acts without the authority express or implied of his copartners; unless the partnership is benefited

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by his act, in which case all the partners are bound." Now what benefit did Cook & Co. derive by the act of James William Cook? They derived no benefit so far as profits were concerned, because, as already stated, they received no profits. Knight did not consider that he was a partner with them by reason of the contract which he had entered into with James William Cook, and which had not been authorized or ratified by either of his other partners. It is said that George Josiah Cook read the contract, about 1873 or 1874, and that he did not give notice to Knight or to anybody else that he did not consent to the arrangement which James William Cook had entered into. But to whom was he to give notice? Knight had never stated that he considered the contract binding on him. John Larkin Cook had never become bound. Why then should George Josiah Cook give notice to Knight in 1874 that he did not consider himself bound as a partner by the agreement which his brother James William Cook had entered into in 1869, when Knight had never rendered an account of profits or ever shewn that he treated him as a partner? There was no necessity for George Josiah Cook to give such notice, even if he read in 1874 the agreement that was entered into in 1869.

Further, it was said that, by a letter which Cook & Co. wrote in 1876, they acknowledged their liability. Now that letter was not an acknowledgment of their liability; on the contrary, they were proceeding to enter into a contract, binding themselves, not for their own debt, but for the debt of Knight. They say:— "With reference to the amount due to you by Mr. A. F. A. Knight, we will see it settled on the following conditions, &c." They do not say, "With reference to the debt which we owe to you as partners with Knight, we will settle it." Dunn & Co. never said, "You are liable yourselves; you are now proposing to guarantee Mr. Knight's debt, but it is your own debt, you are partners with Knight." There was nothing of that sort; they assented to the fact that it was Mr. Knight's debt, and not the debt of A. F. A. Knight including the Cooks.

Their Lordships therefore are of opinion that the lower Courts came to a right conclusion in holding that there was no partnership, and that neither George Josiah Cook, nor John Larkin

Cook were liable in the action, and they will humbly advise Her Majesty that the decision of the Court of Queen's Bench be affirmed, and that the appeal be dismissed. The appellants must pay the costs of this appeal.

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Solicitors for the appellants: *Bompas, Bischoff, Bompas & Coxe.*

Solicitors for the respondents: *Simpson & Co.*

[PRIVY COUNCIL.]

THE TRUSTEES, EXECUTORS, AND AGENCY COMPANY, LIMITED, AND TEMPLETON . . . . . } PLAINTIFFS;

AND

SHORT . . . . . DEFENDANT.

J. C.* 1888 *June* 22, 26; *Aug.* 1.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Limitation Act 3 *of* 1837—*Act ceases to run against lawful Owner when Intruder relinquishes possession.*

The English Limitation Act (3 & 4 Will. 4, c. 27), adopted by New South Wales Act No. 3 of 1837, does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the Act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The Act applies not to want of possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time.

APPEAL from a judgment of the Supreme Court (Oct. 27, 1886) refusing a rule nisi for a new trial in an action of ejectment to recover fifty acres of land situate in Botany Bay, in the Colony of New South Wales.

The facts of the case are stated in the judgment of their Lordships. The proceedings in the Court below are reported in N. S. Wales Rep. vol. vii. (N.S.) p. 365.

* *Present:*—LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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Chief Justice Martin told the jury at the trial that when any person went into possession of another person's land, and exercised dominion over it with the intention of claiming it, and the Statute of Limitations thereupon began to run as against the owner of the land, such running was never stopped, notwithstanding that the intruder entirely abandoned the land long before the expiration of twenty years from his first entry, and no other person took possession of such land, and that the right of the true owner of the land would not again arise without an entry by such true owner with the intention of repossessing himself of such land; that at the expiration of twenty years after such taking possession of the land as against the true owner his right of action was defeated, notwithstanding that there may not have been twenty years' possession as against him; that if Meredith, through whose possession the defendant claimed, abandoned the land in the year 1853, and afterwards, until the defendant came there, no person was in possession of the land, still the statute continued to run as against the plaintiff; and that the statute barred the plaintiff's right of action herein.

The Supreme Court (Martin, C.J., Faucett and Windeyer, JJ.) affirmed this ruling.

Sir *H. Davey*, Q.C., and *Vaughan Hawkins* (Lord *Colin Campbell* with them), for the appellants, contended that this ruling was wrong. Under 3 & 4 Wm. 4, c. 27, the title of the rightful owner to land is not defeated unless some other person or successive persons has or have been in possession thereof for a continuous period of twenty years. If before that period has elapsed the person who has got into possession relinquishes it, so that no one other than the rightful owner is in possession, the rightful owner's title remains good. He is not obliged to go upon the land or do some act of ownership to restore his title, and if at a later period another person gets into possession time runs against the rightful owner from the latter taking of possession, and not from the former. The effect of the directions of the Chief Justice was that the jury were precluded from considering the evidence tending to shew that, assuming Meredith to have been at one time in possession of the land in suit, he relinquished such

possession in 1853, long before the end of twenty years, and that after that date no one other than the rightful owner was in possession until the respondent entered. Reference was made to Sugden's Real Property Statutes, p. 33, sect. 3; *McDonnell* v. *McKinty* (1); *Smith* v. *Lloyd* (2); *Poole* v. *Griffith* (3); Smith's Leading Cases (9th ed.), p. 741; *Day* v. *Day* (4); *Harnett* v. *Green* (5); *Dixon* v. *Gayfere* (6); *Laing* v. *Bain* (7); *Brown* v. *Lethbridge*, cited in Oliver's Real Property Statutes, p. 75; *Doe* d. *Carter* v. *Barnard* (8).

Horne Payne, Q.C., and *Mackay*, for the respondent, contended that the appellants were barred by the Statute of Limitations (3 & 4 Will. 4, c. 27), which had by the local Act 3 of 1837 been adopted in the Colony, and by the possession of the respondent and of the persons through whom he derived title, from bringing this action. The appellants must shew a right of possession as well as a right of property. The onus was on them to shew a possession in fact some time within twenty years before action brought. Here the plaintiffs, or those through whom they claim, lost possession forty years ago, and never afterwards regained it. The statute began to run, and would only cease to run on the plaintiffs' regaining possession. If they failed to do so within twenty years, they could not afterwards recover it. It is unnecessary for the defendant to make out a title derived from the first intruder. Being in possession of land in reference to which the statute has been set running, he is entitled to hold it after the expiration of the statutory period against the rightful owner. The authorities support that view. Reference was made to *Taylor* d. *Atkyns* v. *Horde* (9); *Nepean* v. *Doe* (10); *Doe* d. *Carter* v. *Barnard* (8); *Doe* d. *Goody* v. *Carter* (11); *Dixon* v. *Gayfere* (6); *Asher* v. *Whitlock* (12); Smith's Leading Cases (9th ed.), p. 799; Dart's Vendors and Purchasers (ed. 1888),

(1) 10 Ir. C. L. Rep. 514.
(2) 9 Exch. Rep. (O. S.) 562.
(3) 15 Ir. C. L. R. 239.
(4) Law Rep. 3 P. C. 751.
(5) 4 N. S. W. L. R. 292.
(6) 17 Beav. 421.
(7) Knox's Rep. 264.
(8) 13 Q. B. 945.
(9) 1 Burr. 60; 2 Smith's Leading Cases, 632.
(10) 2 M. & W. 910, and 2 Smith's Leading Cases, 610.
(11) 9 Q. B. 863.
(12) Law Rep. 1 Q. B. 1.

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vol. i. pp. 464, 466; *Adair* v. *Shaftoe* (1); *Seaman* v. *Vawdrey* (2); *McDonnell* v. *McKinty* (3); *Keyse* v. *Powell* (4); *Smith* v. *Lloyd* (5); *Tottenham* v. *Byrne* (6); *Poole* v. *Griffiths* (7); *Governors of Magdalen Hospital* v. *Knotts* (8); *Day* v. *Day* (9); Comyns' Dig., tit. Trespass; *Rains* v. *Buxton* (10); *Grant* v. *Ellis* (11); *Doe* d. *Hughes* v. *Dyball* (12); *Clarke* v. *Clarke* (13); *Doe* d. *Pritchard* v. *Jauncey* (14); *Doe* d. *Evans* v. *Page* (15); *Brassington* v. *Llewellyn* (16); *Doe* d. *Harding* v. *Cooke* (17); *Doe* d. *Duroure* v. *Jones* (18): *Homfray* v. *Scroop* (19); *Rhodes* v. *Smethurst* (20).

Sir *Horace Davey*, Q.C., replied, referring especially to *Poole* v. *Griffith* (7).

1888 *Aug.* 1.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

On the 3rd of December, 1885, the appellants, as plaintiffs, brought an action against the respondent, as defendant, to recover fifty acres of land situated in the district of Botany Bay, in the county of Cumberland, in the colony of New South Wales.

The defence was the Statute of Limitations (3 & 4 Will. 4, c. 27), which was adopted in the Colony by the Act No. 3 of 1837.

The action came on for trial in September, 1886, before the late Chief Justice Martin and a jury.

For the present purpose the facts of the case may be stated very shortly. The land in dispute was, until recently, waste open bush. The plaintiffs at the trial proved a complete docu-

(1) 19 Ves. 156.
(2) 16 Ves. 390.
(3) 10 Ir. L. R. 514.
(4) 2 E. & B. 132.
(5) 9 Exch. 562.
(6) 12 Ir. C. L. R. 376.
(7) 15 Ir. C. L. R. 239.
(8) 8 Ch. D. 709, 727.
(9) Law Rep. 3 P. C. 751.
(10) 14 Ch. D. 537.
(11) 9 M. & W. 113.
(12) 3 C. & P. 610.
(13) 2 Ir. Rep. C. L. 395.
(14) 8 C. & P. 99.
(15) 5 Q. B. 767.
(16) 27 L. J. (Exch.) 297.
(17) 7 Bing. 346.
(18) 4 T. R. 300.
(19) 13 Q. B. 509.
(20) 4 M. & W. 42.

mentary title deduced from a Crown grant in 1810. But they failed to prove to the satisfaction of the learned judge at the trial that they or any person through whom they claimed had been in actual occupation of the land at any time during the period of twenty years immediately preceding the commencement of the action. On the other hand the defendant, who claimed to have purchased the land within the last few years, did not prove to the satisfaction of the learned judge that he and the person or persons through whom he claimed had been in continuous possession during the statutory period.

The Chief Justice told the jury that when any person went into possession of another person's land, and exercised dominion over it, with the intention of claiming it, and the Statute of Limitations thereupon began to run as against the owner of the land, such running was never stopped, notwithstanding that the intruder abandoned the land long before the expiration of twenty years from his first entry, and no other person took possession of such land, and the right of the true owner to the land would not again arise without an entry by such true owner with the intention of repossessing himself of such land. The Chief Justice also told the jury that at the expiration of the twenty years after such taking possession of the land, as against the true owner, his right of action was defeated, notwithstanding there may not have been twenty years' possession as against him.

A verdict was found for the defendant.

On the 27th of October, 1886, the plaintiffs applied for a rule nisi for a new trial on the ground of misdirection. The application was heard before the late Chief Justice, Faucett, J., and Windeyer, J., who refused the rule. The Chief Justice is reported to have said: "There is no doubt that there was evidence sufficient to justify the verdict of the jury as to the occupation of the land more than forty years ago, which caused the statute to run against the legal owner. That being so, there was no evidence whatever that the legal owner during that time ever retook possession, or even walked over the land. The statute having been set running there was nothing to stop it."

To this report Faucett, J., has been good enough to append

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the following memorandum for the information of their Lordships:—

"This is substantially a correct note of the reasons given by the late Chief Justice for refusing the rule in this case. His judgment was given in very few words.

"I may add that it has been before held by this Court that when the rightful owner of land has been dispossessed, and the statute has once begun to run against him, the statute does not cease to run; in other words, the operation of the statute is not suspended until the rightful owner has exercised some act of ownership on the land; and that if the rightful owner allows twenty years to elapse, from the time when the statute so first began to run, without exercising any such act of ownership, he cannot recover in ejectment against any person who may happen to be in possession at the end of the twenty years, although there may have been an interval in the twenty years during which no one was in possession.

"To stop or suspend the operation of the statute there must be some new act of ownership on the part of the rightful owner. There must be, as it were, a new departure."

The doctrine appears to have had its origin in the case of *Laing* v. *Bain*, which was before the Supreme Court on a motion for a new trial in March, 1876. Their Lordships were referred to a note of the case in Oliver's Real Property Statutes, p. 79. Martin, C.J., is there reported to have said that "it was clear law that if the statute once commenced to run it would not stop except by the owner going into possession and so getting, as it were, a new departure."

Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate

himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.

There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute "continues to run" because there is a person in possession in whose favour it is running.

There is no direct authority on the point in this country. But such authority as there is seems to be opposed to the doctrine laid down by the Supreme Court. It is sufficient to refer to *McDonnell* v. *McKinty* (1), Lord St. Leonards' Real Property Statutes, p. 31, and *Smith* v. *Lloyd* (2). In the latter case, which was decided in 1854, Parke, B., giving the judgment of the Court, says:—"We are clearly of opinion that the statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J., in *McDonnell* v. *McKinty*, and the principle on which it is founded."

Their Lordships have only to add that, in their opinion, there is no difference in principle as regards the application of the statute between the case of mines and the case of other land where the fact of possession is more open and notorious. It is obvious that, in the case of mines, the doctrine contended for might lead to startling results and produce great injustice.

In the result, therefore, their Lordships have come to the conclusion that the direction given to the jury by the learned Chief Justice was not law, and they think that there was substantial miscarriage in the trial.

They will, therefore, humbly advise Her Majesty that the

(1) 10 Ir. L. R. 514. (2) 9 Exch. (Welsby, H. & Gor.) 562.

J. C. 1888 AGENCY COMPANY v. SHORT.

judgment of the Supreme Court refusing the rule nisi ought to be reversed, that a new trial ought to be directed, and that the costs in the former trial and of the application for the rule ought to be costs in the action.

The respondent will pay the costs of the appeal.

Solicitors for the appellants: *Want & Harston.*
Solicitors for the respondent: *Morley & Shirreff.*

[PRIVY COUNCIL.]

J. C.* 1888 *July* 31; *Aug.* 2, 4.

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } DEFENDANT;

AND

JENNINGS . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Revised Statutes of Ontario, c. 135, *ss.* 2 *&* 3—*Compensation in respect of Death—Measure of Damages—Policy of Insurance.*

The right conferred by Lord Campbell's Act, adopted by Consolidated Statutes of Ontario, c. 135, ss. 2 and 3, to recover damages in respect of death occasioned by wrongful act, neglect or default is restricted to the actual pecuniary loss sustained by the plaintiff.

Where the widow of deceased is plaintiff, and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased.

Hicks v. *Newport, &c., Railway Company* (4 B. & S. 403, n.) approved.

APPEAL from a judgment of the Court of Appeal (Sept. 6, 1887) affirming a judgment of the Queen's Bench Division of the High Court (May 31, 1886) which discharged an order nisi obtained by the appellant company calling on the respondent to shew cause why the verdict and judgment in an action tried on the 5th and 6th of April, 1886, should not be set aside and

* *Present:*—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, and SIR BARNES PEACOCK.

judgment entered for the appellants or a new trial had between the parties on the ground of misdirection and on other grounds. The action was founded on Revised Statutes, 1877, c. 128, ss. 2 and 3, which is the same as c. 135 of the later revision.

The facts of the case and the proceedings are stated in the judgment of their Lordships.

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McCarthy, Q.C. (Canada), and *Jeune*, Q.C., for the appellants, contended that the jury ought under the circumstances to have been directed to deduct the insurance money on the life of the deceased from the amount of damages awarded by them to the respondent. At least they ought to have been directed that in awarding such damages they ought to take into consideration the receipt of the said insurance money by the respondent. Reference was made to *Beckett* v. *Grand Trunk Railway Company* (1); *Blake* v. *Midland Railway Company* (2); Mayne on Damages (3rd ed.) (3); *Pym* v. *Great Northern Railway Company* (4), and the case of *Hicks* v. *Newport, Abergavenny, and Hereford Railway Company* in a note to the last report, p. 403, vol. 4, which includes a charge to the jury by Lord Campbell; *Rowley* v. *London and North Western Railway Company* (5); *Bradburn* v. *Great Western Railway Company* (6); *Mary Seward* v. *The Owner of the Vera Cruz* (7), and to *Sykes* v. *North Eastern Railway Company* (8), which is referred to in *Beckett's Case*.

The respondent did not appear.

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Aug. 4.

The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal is taken in an action brought by the respondent in the Court of Queen's Bench, Ontario, for damages in respect of the death of her husband, the late William Jennings; her right to recover being founded upon c. 135 of the Consolidated

(1) 8 Ontario Rep. 601; 13 Upper Canada Appeal Rep. 174.
(2) 18 Q. B. (N.S.) 93.
(3) Pages 447, 449.
(4) 2 B. & S. 759, 769; S. C. 4 B. & S. 396.
(5) Law Rep. 8 Ex. 221.
(6) Law Rep. 10 Ex. 1.
(7) 9 P. D. 96; S. C. 10 App. Cas. 59, 70.
(8) 44 L. J. (N.S.) (C.P.) 191.

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Statutes of Ontario, ss. 2 and 3, which are expressed in substantially the same terms with the 1st and 2nd sections of the English statute, 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act. The deceased, who was a healthy man, forty-one years of age, lost his life on the 10th of August, 1885, through the negligence of the appellants' servants. He had been for upwards of eighteen years in the employment of the American Express Company, and had for a considerable time been earning wages at the rate of $75 per month. He left no estate, real or personal, but he was a member of the Ancient Order of United Workmen, a benefit society, with which he had effected a life policy for $2000, payable to the respondent; and the sum insured was paid to her in full after his decease.

At the trial of the cause the appellants' counsel asked Chief Justice Wilson, the presiding judge, to direct the jury that, inasmuch as the sum of $2000 was not for the benefit of the deceased, but was immediately payable to the respondent in respect of his death, they ought to deduct it from the amount which they might assess as damages. The learned Chief Justice refused to give the direction. The appellants then obtained an order nisi on the ground, inter alia, that the judge had erred in not directing the jury to deduct the amount of the policy on the life of the deceased from the amount of the verdict. The order nisi was discharged by the Queen's Bench Division, and their judgment was affirmed by the Court of Appeal for Ontario.

In ruling the point thus raised against the appellants, the learned judges of the Courts of Ontario considered themselves bound by the authority of *Beckett* v. *Grand Trunk Railway Company* (1), which was finally decided, on appeal from Ontario, by the Supreme Court of Canada. In that case, which was very similar in its circumstances to the present, the judge presiding at the trial directed the jury to deduct $2500, the amount of an insurance policy on the life of the deceased, from the sum at which they estimated the pecuniary loss sustained by his wife and children through his death; and the jury following the direction assessed damages at $3250. An order obtained by the plaintiffs to shew cause why the verdict should not be increased

(1) 13 Upper Canada Court of Appeal Rep. 174.

by the sum of $2500 so deducted was made absolute by a Divisional Court of the Queen's Bench, and judgment entered for the plaintiffs for the sum of $5750 with costs. In the Court of Appeal for Ontario, and also in the Court of Appeal for Canada, the case gave rise to much difference of judicial opinion; but, in both, the decision of the Divisional Court was upheld.

In this appeal the appellants have raised precisely the same point which they unsuccessfully pressed in *Beckett's Case* (1). They have never, in the courts below, suggested that the receipt of the insurance money by the widow was merely one of the circumstances which ought to be taken into account by the jury in estimating her pecuniary loss; their contention has all along been, that the primary duty of the jury is to assess damages, irrespective of any such consideration, and that the Court or the jury are then bound, as matter of law, to deduct from the damages assessed on that footing the full amount paid to the widow under the policy. It is true that, in the reasons of appeal appended to their case, the appellants plead alternatively that the jury ought "at least, in awarding such damages, to take the receipt of the said insurance money by the respondent into their consideration"; but litigants who have excepted to the presiding judge's refusal to give a direction in law, which, if given, would practically have withdrawn the insurance money from the consideration of the jury, cannot be permitted to impeach their verdict for the first time in a court of review, on the ground that the judge ought to have given a direction the very reverse of that for which they insisted at the trial. Unless, therefore, it can be shewn that every cent of the $2000 paid to the respondent, on account of the policy upon her husband's life must, as matter of law, be deducted from the $6000 found by the verdict of the jury, the present appeal must fail.

In *Beckett's Case*, as well as in the present, all the Courts below have justly held that the right conferred by statute to recover damages in respect of death occasioned by wrongful act, neglect, or default, is restricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application; but in others,

(1) 13 Upper Canada Court of Appeal Rep. 174.

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the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture. When a man has no means of his own, and earns nothing, it is obvious that his wife or children cannot be pecuniary losers by his decease. In like manner, when by his death the whole estate from which he derived his income passes to his widow, or to his child (as was the case in *Pym* v. *Great Northern Railway* (1)), no statutory claim will lie at their instance. A very different case arises when the means of the deceased have been exclusively derived from his own exertions, whether physical or intellectual. It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work, and remuneration; and also how far these, if realized, would have conducted to the benefit of the individual claiming compensation.

Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life, effected and kept up by a man in the position of the deceased William Jennings. The pecuniary benefit which accrued to the respon-

(1) 2 B. & S. 759; S. C. 4 B. & S. 396.

dent from his premature death, consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him, out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell, in *Hicks* v. *Newport, &c., Railway Company* (1), suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy.

For these reasons, their Lordships are unable to affirm that the exception taken by the appellants to the ruling of the presiding judge is well-founded. They are not disposed to regret the result, because it appears that the learned judge excluded from the consideration of the jury all chances of the deceased's having obtained a rise of wages, or of his having been able to make some further provision for his widow. They will humbly advise Her Majesty that the judgment of the Court of Appeal for Ontario ought to be affirmed, and the appeal dismissed. The appeal being ex parte, there will be no order as to costs.

Solicitors for the appellants: *Johnston, Harrison & Powell.*

(1) 4 B. & S. 403, n.

[PRIVY COUNCIL.]

J. C.* 1888 June 28, 29; July 3, 5, 6; Aug. 4.

SCEBERRAS D'AMICO . . . . . DEFENDANT;

AND

SCEBERRAS TRIGONA . . . . . PLAINTIFF.

AND CROSS APPEAL.

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

Law of Malta—Construction—Primogenitura—Descent in an exclusively Male Line derived from a Female—Descent of a Barony established as a hereditary Feud—Pragmatic of Philip IV., No. 34.

Where the founders of a Maltese primogenitura limited the succession by a deed of settlement in 1695 to the eldest and other sons of F., the original donee, and their respective male lines; then on failure of all those lines to his female issue and their respective descendants after them in a prescribed order, derived from repeated indications in the deed that the line of descent was to be exclusively male though traced from a female head of line; and, lastly, on failure of all his male and female issue, to the younger brothers of the original donee and their respective issue; and it appeared that the original donee had daughters only:—

Held, that according to the true construction of such prescribed order of succession, notwithstanding the general presumption of Maltese law in favour of the "regular" course of succession, which admits females descended from the last holder in preference to all collaterals, the succession from females was effectively declared to be in lines of "artificial agnation," that is the male line of descendants from a female ancestress through males were intended to take exclusively of females till that male line was exhausted; and consequently that the respondent, the half-brother of the last holder, succeeded in preference to the daughter.

F. also held a barony (established under the Frank princes in Naples and Sicily as a hereditary feud, alienable with the Royal assent), under a settlement of 1674, which limited the same to his descendants generally. By his will he purported to annex the same to the said primogenitura, thereby purporting to impress upon it the character of a majorat descendible to males to the exclusion of females:—

Held, that assuming that a former settlement of the barony in 1613 did not establish the succession unalterably in favour of the "regular" lineal descent, F. could so annex it to the extent permitted by the Pragmatic of Philip IV., No. 34. Case remitted to the Court below to investigate

* *Present*:—THE EARL OF SELBORNE, LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

whether the succession to the barony was still prescribed by the settlement of 1613, notwithstanding the settlement of 1674, and, if not, within what limits the will of F. was operative in regard thereto according to the natural construction of the Pragmatic; unless there be any settled usage or interpretation thereof at variance with its natural construction and so entitled to prevail.

APPEALS from two judgments of the Second Hall of the Court of Appeal (August 3, 1885), one of which unanimously reversed a judgment of the First Hall of the Civil Court (Oct. 6, 1883), and adjudged the barony of Castel Cicciano to belong to the defendant, the other of which, by a majority of two judges to one, affirmed the said judgment of the 6th of October in favour of the plaintiff as regarded his claim to the primogenitura in suit, under a marriage settlement dated the 8th of February, 1695, made on the marriage of Paolo Testaferrata and Beatrice Cassia.

The most material parts of the deed of 1695 are contained in the following six clauses :—

1. Et cum dictus Dominus Paulus quibus supra nominibus prospiciens perpetuæ posteritati Nobilis suæ Familiæ de Testaferratis, et agnoscens familias in earum decore, opibus ac divitijs conservari, ijsque divisis diminui; Ideo quia sic ipsi placuit et placet expresse voluit et vult mandavitque et mandat quod territorium prædictum del Migiarro et Villa Cagliaresia cum eorum pertinentijs omnibus et singulis ut supra dicto Domino Fabritio donatis pleno jure ad ipsum D. Fabritium vita sua durante spectent, et spectare debeant, et post eiusdem mortem succedat, et succedere debeat in dd. Territorio et Villa, et cum dd. eorum pertinentijs filius primogenitus ipsius D. Fabritij, et post mortem dicti filij primogeniti eiusdem filius primogenitus, nepos, pronepos, primogenitus, alijque descendentes unus post alium de primogenito in primogenitum servato semper gradu primogenituræ in perpetuum etiam ultra decimum vigesimum gradum, et in infinitum. Ita ut durante linea masculina dicti filij primogeniti præfati Domini Fabritij de primogenito in primogenitum, ille qui primogenitus erit succedat et primogenitus intelligatur etiam quando unicus esset. Et si tempore obitus dicti Domini Fabritij aut cuiuscumque alterius ex eo descendentis primogeniti filius primogenitus non supererit, succedat eiusdem primogeniti sic

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decedentis filius, nepos, pronepos, primogenitus, ac alij descendentes unus post alium de primogenito in primogenitum ordine successivo primogenituræ in perpetuum et in infinitum ut supra, et non aliter.

2. Et si nullus ex linea masculina dicti primogeniti in primogenitum extaret, tunc succedat, et succedere debeat alius masculus de linea masculina primogeniti dicti Domini Fabritij proximior ultimo primogenito morienti sine filijs, et eiusdem proximioris masculi filij, nepotes et pronepotes, ac omnes descendentes masculi cum sua primogenitorum serie in perpetuum, et in infinitum prout supra dispositum est. Et sic dicendum et observandum in casu defectus lineæ masculinæ cuiuscumque alterius primogeniti in hac primogenitura subintrantis ex linea masculina primogenita dicti Domini Fabritij, ut semper succedat, ac succedere debeat tali primogenito ut supra morienti alius masculus de dicta linea masculina primogeniti dicti Domini Fabritij exclusis semper ut supra fœminis eidem primogenito sic morienti proximior, et eiusdem filji ac descendentes in perpetuum, et in infinitum cum serie dictæ primogenituræ ut supra, et non aliter.

3. Et in casu defectus masculorum lineæ masculinæ primogeniti dicti Domini Fabritij succedant, ac succedere debeant alij masculi primogeniti ex lineis masculinis aliorum filiorum masculorum eiusdem D. Fabritij gradatim et ordine successivo unus post alium servato semper ordine primogenituræ in perpetuum, et in infinitum modo superius expresso cum prælatione lineæ secundi geniti alteri lineæ tertij geniti, et sic gradatim quoad alias lineas masculinas dicti Domini Fabritij, et non aliter.

4. Et extinctis omnibus lineis masculinis ex masculis dicti D. Fabritij, succedant, et succedere debeant in dd. Territorio et Villa Cagliaresia femina ex descendentia ipsius Domini Fabritij maior nata proximior ultimo primogenito morienti sine filiis masculis eiusdemque feminæ filij masculi primogeniti eorumque descendentes masculi in perpetuum et in infinitum gradatim, et ordine successivo cum serie primogenitorum, et cum conditionibus superius expressis.

5. Et si tempore obitus dicti primogeniti reperiretur mortua dicta femina primogenita proximior, pariter succedere etiam debeant eiusdem filij, ac descendentes masculi primogeniti ut

supra. Et sic dicendum, et observandum in casu defectus lineæ dictæ feminæ, et cuiuscumque alterius feminæ in hac primogenitura subintrantis earumque descendentium, ut semper, et cunctis futuris temporibus alia femina ex descendentia dicti Domini Fabritij primogenita proximior ultimo primogenito decedenti sine descendentibus eiusque filij, ac descendentes masculi primogeniti succedant et succedere debeant in dicta primogenitura in perpetuum et in infinitum; præferendo tamen semper de ijs fœminis proximioribus fœminas eius descendentes ex descendentia ultimi primogeniti morienti sine masculis alijs feminis quamvis proximioribus dicto ultimo primogenito ut supra morienti, modis et conditionibus superius expressis, et non aliter.

6. Et si ex dicto Domino Fabritio nascerentur solum feminæ, pariter major nata succedat, et succedere debeat in dictis bonis primogenituræ predictæ, eiusque filij ac descendentes masculi gradatim et ordine successivo, servato semper ordine primogenituræ in perpetuum ac in infinitum; et in defectu totius descendentiæ dictæ filiæ maioris natu, succedere debeant aliæ filiæ feminæ dicti Domini Fabritij earumque descendentes, servata tamen semper serie primogenituræ predictæ, cum modis et conditionibus superius expressis et non aliter.

The questions in dispute, both with regard to the primogenitura and the barony, are stated in the judgment of their Lordships.

Rigby, Q.C., and *Fullarton* (*Gerald Strickland*, and *Paul Strickland* with them), for the appellant, contended that on the true construction of the deed of 1695 she, as daughter of the last holder, was entitled to exclude the plaintiff, who was half-brother to the last holder. The terms of that deed were consistent with a regular primogenitura, and are therefore to be so construed. The general rule of succession with regard to primogenituras is laid down in the Code Rohan, lib. iv., cap. ii., sect. 10, and under it line is to be considered first, that is, the line of the last holder. Line has priority over all other considerations, whether of degree or age; and, consequently, in a regular primogenitura the daughter succeeds in preference to the brother. Irregular primogenituras are those where the founder has prescribed a course of succession

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inconsistent with the regular legal succession. They are said to be "odious" in law, and every presumption is raised against them. The presumption in favour of regularity prevails, except where the evidence of a contrary intention derived from the deed of settlement is clear and unequivocal. The regular order will prevail except so far as it has been clearly displaced by the founder. Here the terms of the deed of 1695 on their true construction do not exclude the daughter in favour of a collateral male; at least in the event which happened, namely, of Fabrizio having only daughters; at all events they do not do so clearly and indubitably so as to overcome the legal presumption to the contrary. The words of reference in clause (6) do not refer to clauses (2) and (3), but only to clauses (1), (4), and (5). Reference was made to the *Bologna Case* (1); Torre, par. iii., Decisio 38, Nos. 10 and 12; also Torre, Variarum Juris Quæstionum, tom. i., tit. i., quæstio 13; Palma, Nepos, Decisio 453, Nos. 22 and 91; De Comitibus Decisiones Florentinæ, 57 per tot. and especially Nos. 7, 43, and 46–57, also 92, Nos. 19 & 20; Decis. Rot. Rom. coram De Cursiis, Decis. 664, Nos. 4 and 5; Carolus Antonius de Luca, De lineâ legali, lib. i., art. 10, p. 216.

Sir *Horace Davey*, Q.C., and *Jeune*, Q.C. (*Mattei*, with them), for the respondent, contended that the deed was carefully drawn, and provided for every contingency which might arise, and that the succession devolved according to the plain directions of the deed, which overrode any legal presumption to the contrary. By clause 1 the founders direct that so long as the male line of the first-born son of the donee lasts females should be excluded. By clause 2, further directions are made in favour of a male line, "exclusis semper ut supra feminis." Under it males of a subsequent line take in priority to females of a prior line. By clause 3 the same result is attained. Clauses 4 and 5 provide for the eventual succession of a female after the extinction of the male lines, with this proviso, that after a woman has succeeded, the succession again becomes in respect of her descendants a male primogenitura. Clause 6 deals with the case which happened, viz., that the donee left only female issue. The clause is super-

(1) 7 App. Cas. 156 and 8 App. Cas. 106.

fluous if the primogenitura were regular, it is requisite because it is an exclusively male one. It is provided that the first four clauses apply to the primogenitura thus descending from a female head of line. Under these circumstances the Court below was right in holding that the respondent took to the exclusion of the appellant. Reference was made to Torre, cap. 25, No. 24; Decis. Rot. Rom. coram de Cursiis, Decis. 664, Nos. 4, 5, 6; Gasparis Antonii Thesauri, Quæstionum forensium, lib. ii., quæstio xii., Nos. 57, 60 and 63; Rota coram Herzan, Decis. 48, Nos. 7, 8, 9, 10; Cardinal de Luca, De lineâ masculinâ et fœminâ, art. 16, Nos. 17, 18, 19; and De lineâ legali, lib. ii., art. 76, No. 5.

As regards the barony, it was contended that that was validly united to the primogenitura, and thenceforward descended therewith. In its origin the barony was of a feudal nature, and in the Neapolitan kingdom all feuds were "more Francorum," that is, it was indivisible, descending according to the rules of a regular primogenitura. It appeared that by a marriage settlement in 1613 Surdo granted the barony to his daughter, creating a primogenitura in respect of it by certain express provisions. It then descended to the father of Beatrice, who gave it to her on her marriage with Paolo Testaferrata. They in turn granted or "refuted" it to Fabrizio by contract dated the 8th of February, 1695. The "refutation" received the royal sanction, which was registered on the 13th of September, 1695. By his will in 1744 Fabrizio united the barony to the primogenitura. This union, it was contended, was validly effected. The feud, on the evidence, was an hereditary feud. If so, the will of Fabrizio in respect to it was valid under the Pragmatic 33, by Philip II. in 1595, Pragmatic 34 by Philip IV., in 1655, and Pragmatic 38 made by Charles VI. in 1720. The effect of Pragmatic 34 is that all holders of feuds had the power to create thereon a male primogenitura, and to exclude from the succession the nearest female, giving the preference to the remotest male. Further, it was contended that the feud was "emptitium," and therefore the holder had the right to impose on it a male primogenitura without the Royal assent. If, however, the Royal assent was necessary, it ought to be presumed at this distance of

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time. Reference was made to Sorge de Feudis, c. 1, No. 25, c. 2, No. 11; c. 2, p. 57; c. 3, Nos. 1, 2 and 3; to the "Constitutio Divæ Memoriæ," specially enacted by the Emperor Frederick for Neapolitan Feuds; Card. de Luca, De Feudis, Disc. xix., No. 19, Disc. 36, No. 6, Disc. 46, No. 7; Capyciolatro, vol. 1, Consil. lxxxi., Nos. 6, 7, 8 and 9; De Franchis, Decis. S. R. C. Neapolitani, Decis. 6 and 7; Capyciolatro, Consult. lxxxi. and xxviii., No. 61; Calcagnini, De Variatione Ultimæ Voluntatis, tom. i., art. 7, § 46, 47; De Luca, De Feudis, Disc. 45, No. 7; Sorge, De Feudis, c. 27; De fideicommissis et marjoratis super feudis, n. 13.

Rigby, Q.C., replied, in reference to the primogenitura, and as regards the barony, contended in the cross-appeal that if the appellant should be held entitled to the primogenitura it followed, on the respondent's contention as to a valid union under the will of Fabricius that the appellant was also entitled to the barony. If, however, the appellant failed to make out her title to the primogenitura, that is to say, if the primogenitura excluded her in favour of a collateral male, then it differs completely from the succession laid down by Surdo in the settlement of 1613. Even if Fabrizio had so intended by his will in 1744 he had not the power to alter the succession to the barony in the manner contended for on the other side. The royal license or assent was requisite under the Constitution of the Emperor Frederick. The feud, by its form, is by presumption of law a mixed feud, and as such passed by regular primogenial order independent of and even against the will of the last holder: Sorge, De Feudis, ci. No. 25, cii. No. 11, c. 47 No. 1; Capyciolatro, Cons. 9 and 10; Pragmatic Sanctions, No. 33 of 1595 and No. 34 of 1655; De Luca, de Feudis, Disc. xix. No. 19, Disc. 36, No. 6, Disc. 49, No. 7, Disc. 21, No. 1, Disc. 108, No. 7. Surdo's settlement received the royal assent, and the barony is still governed thereby. The Pragmatic sanctions did not authorize Fabrizio to alter the nature of the succession in the way suggested by the respondent. They are not applicable to a mixed feud such as this, but only to a hereditary feud. They do not free the holders under Surdo from the conditions imposed by

Surdo with the royal assent. Lastly, they do not permit an entail beyond the fourth degree, and the respondent is beyond that degree from Fabrizio. The appellant is entitled to the barony according to the succession prescribed by Surdo even if she fails with regard to the primogenitura.

The judgment of their Lordships was delivered by

The Earl of Selborne :—

In this case there are cross appeals; the one relating to a Maltese primogenitura, or perpetual entail of lands, founded by a deed dated the 8th of February, 1695; the other to a Neapolitan barony, of Castel Cicciano, to which certain civil and criminal jurisdictions were formerly annexed, but which now appears to be a mere title of honour.

The primogenitura and the barony were both held by the Baron Alessandro Sceberras, half brother of the respondent, and father of the appellant, in the first appeal. He died without male issue, on the 15th of October, 1880, leaving two daughters, of whom the appellant, the elder, is his lineal heir general. The Courts below have adjudged the primogenitura to the respondent, as the nearest male heir to Alessandro, entitled to succeed by descent (under what those Courts have held to be the true construction of the deed) from Clara Sceberras, the common ancestress, all the intermediate descents down to Alessandro having been through the direct male line. The barony also was adjudged by the Court of first instance to the respondent, but that judgment was reversed on appeal.

The deed of the 8th of February, 1695, is an elaborate instrument, executed upon the first marriage of Fabrizio (called in the deed Fabritius), the eldest son of Baron Paolo Testaferrata and Beatrice his wife, the founders or settlors. Its construction depends very much upon the effect of words of reference, found in all the substitutional clauses, to the clause or clauses preceding them. It limits the succession, after Fabritius, first to his eldest and other sons, and their respective male lines; then, on failure of all those lines, to his female issue and their respective descendants after them, in an order upon which the

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determination of the question in the first appeal turns; and, lastly, on failure of all the male and female issue of Fabritius, to his younger brothers and their respective issue.

The question is whether, under this deed, when the agnatic male line descended from Fabritius was exhausted (or in the event, which happened, of his having daughters only), the descendants of females, taking each in her turn as the head of a new line, were to take in what the Maltese law regards as a "regular" course of succession, which admits females descended from the last holder in preference to all collaterals; or whether the male line of descendants from a female ancestress through males was to take, exclusively of females, till that male line was exhausted.

The general presumption of Maltese law is in favour of the "regular" order of succession; some authorities say that, if the construction be doubtful, that presumption must prevail. But the founder of a primogenitura might displace the "regular" order of succession, if he pleased; and such an intention, if sufficiently manifested, must receive effect. The question, therefore, is merely one of the proper construction of the deed; and, to ascertain this, all parts of the instrument may properly be taken into account.

Upon a careful consideration of the deed of the 8th of February, 1695, and all its parts, their Lordships have come to the conclusion that the judgment appealed from (in the first appeal) is right; and that the succession from females, under this primogenitura, is in lines of the kind described by Cardinal Luca (De Linea Legali, lib. 1, art. 10, p. 216) as lines "of *artificial agnation.*"

In the first place, it is to their Lordships clear, that no female could succeed, under this primogenitura, until all the male lines descended through males from Fabritius were exhausted. The learned judge, who dissented in the court below from the judgment under appeal, was not of that opinion; perhaps he might have been right, if there had been no such clauses in the deed as those numbered 2 and 3 in the print, and if the clause numbered 1 had ended with the words "*in infinitum.*" But the words which follow in that first clause, "Ita ut, *durante*

linea masculina dicti filii primogeniti," &c., are, in their Lordships' judgment, sufficient to shew that the preceding words, "*filius primogenitus nepos, pronepos primogenitus aliique descendentes unus post alium de primogenito in primogenitum*," were not used in any flexible, but in their proper masculine sense, and were meant to be exclusive of females. The clauses numbered 2 and 3 appear to their Lordships to place this beyond the possibility of reasonable doubt; the former of which, together with other plain and unequivocal expressions, contains the words, "*exclusis semper, ut supra, feminis.*" The phrase "*linea masculina*," properly means a line commencing with a male, and continued through males. Many authorities on that point were quoted at the Bar; but it is sufficient to mention the definition of the Roman Rota, approved and adopted by Cardinal Luca (De Linea Legali, lib. 2, art. 76, num. 5), "Linea masculina inchoatur a masculis, et continuat in masculos; cum autem pervenerit ad feminas, statim finitur;" to which the Cardinal adds, "Linea masculina etenim est, quæ componitur simpliciter ex masculis, absque intermixtione feminarum." It requires some explanatory context to give it the narrower meaning of a line commencing only with a male; and the context here is all the other way.

The clauses which introduce females, after the exhaustion or for want of agnatic male descendants of Fabritius, are two; the former improperly divided in the print under the numbers 4 and 5; the latter numbered 6. Between the former of these, which really governs the interpretation of the latter, and the second of the three earlier clauses which regulate the agnatic descent of the primogenitura from Fabritius, there is a close parallelism, continued from the beginning to the end, with such adaptations only and differences of phrase as the substitution of females, as new heads of line, rendered proper, and with the interjection (at the point numbered 5 in the print) of a conditional clause corresponding exactly with that appended to the original words of institution at the end of clause 1. The phrase "*linea masculina*" would be inappropriate to a line commencing with a female, though continued exclusively through males; it is therefore no longer used; and, doubtless, for the same reason,

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the words, "*exclusis semper, ut supra, feminis,*" are not repeated. But to shew that lines of unbroken male succession from each female head of the new line are intended, the words "*ejusdemque feminæ filii masculi primogeniti, eorumque descendentes masculi in perpetuum et infinitum gradatim et ordine successivo,*" are used; which, in the judgment of their Lordships, signify, in this context, an unbroken male line of descent through males from the female ancestress, as "*linea masculina*" did from the male ancestor. In an extract from Cardinal Luca (quoting with approval a decision of the Roman Rota), "*descendentes masculi*" is treated as an expression equivalent, for the purpose of excluding females descended from males, to "*linea masculina*" or "*sexus purus masculinus.*"

It should be added, that the same expression, "*descendentes masculi,*" occurs in several other parts of this deed: once in each of the clauses numbered 2 and 6; and twice in that numbered 7, which provides for the succession, on failure of all descendants male and female of Fabritius, of Hyacinthus, his next brother, and his issue. Under the scheme of the preceding clauses, on failure of the "male descendants" of one female, the next female descendant of Fabritius, and her "male descendants" were to succeed; and so on, *toties quoties, ad infinitum,* until all the issue, male and female, descended from Fabritius were exhausted.

More might be said as to other indications of exclusively male lines of descent, though traced from female heads of line, in these clauses. If a "regular" course of descent had been intended, different and much simpler phraseology would doubtless have been used, because it would have been sufficient, and more appropriate, for that purpose. But the words of reference which are found in these and other clauses, and which play an important part in them, are sufficient, in their Lordships' judgment, to make the intention to deviate from that "regular" course as clear as any general presumption in its favour can be held to require. Before adverting to them particularly, it seems proper to observe, that when the interpretation of the preceding clause (improperly divided in the print) is known, that of clause No. 6, which provides for the case which happened of Fabritius

having daughters and no son, is also determined. That case might probably have been covered by the preceding clause, if No. 6 had not been in the deed; but it was thought better to provide expressly for it, "in like manner" (*pariter*) with what had gone before. "Et si dicto domino Fabritio nascerentur solum feminæ, *pariter* major nata succedat et succedere debeat in dictis bonis primogenituræ prædictæ, ejusque filii et descendentes masculi, gradatim et ordine successivo, servato semper ordine primogenituræ, in perpetuum ac in infinitum," &c., very nearly the same words, as those of the earlier part, numbered 4, of the preceding clause.

The words of reference, found in these clauses and elsewhere, relate to two subjects—the order or "series," and the regulations and conditions (*modi et conditiones*), of the primogenitura. These are incorporated by reference, as to the descent from each head of a new line, as much as if they had been repeated in full detail, *toties quoties*, from those earlier portions of the deed which relate to the agnatic male lines descended from Fabritius. In the part numbered 4 of the clause which precedes the sixth, this is dòne by the words "*cum serie primogenituræ et cum conditionibus superius expressis;*" in the part of the same clause which is numbered 5 by the words "*modis et conditionibus superius expressis;*" and in clause 6, by the words "*servata tamen semper serie primogenituræ prædictæ, cum modis et conditionibus superius expressis, et non aliter.*"

What, then, are the "*series primogenituræ,*" and the "*modi et conditiones,*" thus referred to; where are they to be found? The "*series primogenituræ*" can be nothing else than the leading clause (called in the argument at the Bar, institutional) with which the deed opens, providing for the first line of succession from Fabritius:—

"Succedat et succedere debeat . . . filius primogenitus [ipsius domini Fabritii], et post mortem dicti primogeniti ejusdem filius primogenitus nepos pronepos primogenitus aliique descendentes, unus post alium de primogenito in primogenitum servato semper gradu primogenituræ in perpetuum, etiam ultra decimum vigesimum gradum et in infinitum; ita ut, durante linea masculina dicti filii primogeniti [præfati domini Fabritii] de primogenito

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in primogenitum, ille qui primogenitus erit succedat et primogenitus intelligatur etiam quando unicus esset."

There is nothing in these words which (if the intention were so) might not easily be incorporated into later clauses by proper words of reference, without changing anything except the name of Fabritius for that of each new head of line. The same may be said of the various other clauses of regulation and substitution (modi et conditiones), which follow.

The first clause of substitution (which comes immediately after the words of original institution, at the end of No. 1 of the print) contains the first words of reference:—"*Ordine successivo primogenituræ in perpetuum et infinitum, ut supra, et non aliter.*"

In the clause numbered 2, the next male successor after the exhaustion of the eldest male line of the first born son of Fabritius, and his descendants in the male line, are to take in a manner, again ascertained by reference to the original words of institution:—"*cum sua primogenitorum serie in perpetuum et infinitum, prout supra dispositum est.*" The words which follow, providing *toties quoties* for all other younger male lines descending from the first born son of Fabritius, close again with the formula, "*cum serie dictæ primogenituræ, ut supra, et non aliter.*" The next clause, numbered 3, providing for the male lines descending from younger sons of Fabritius, has words of like import:—"*Servato semper ordine primogenituræ in perpetuum et infinitum, modo superius expresso.*"

Similar forms of reference, both as to the "*ordo primogenituræ,*" and as to the "*modi et conditiones,*" are found in the clauses numbered 7 and 8, which provide for Hyacinthus and his younger brothers, and the lines descending from them respectively, if the events should happen on which they were to succeed.

There is no antecedent to which the words, "*cum serie primogenituræ*" of the clause numbered 4, and "*servata tamen semper serie primogenituræ prædictæ,* of that numbered 6, can reasonably, or indeed possibly, be applied, except the original order of agnatic male descent laid down, in the first clause of institution, as to the line of which Fabritius was the head. These references, therefore, shew with as much clearness as the law can require,

that the descendants of each female, called as a new head of line to the succession, were to take in like manner; that is (to use Cardinal Luca's language) as "lines of artificial agnation."

The 12th clause, on which both sides relied, but which is consistent with the construction thus placed on the governing part of the deed, may be passed over without comment. On the whole of this part of this case, their Lordships are of opinion that the judgment in the respondent's favour, in which the Court of first instance and the majority of the judges in the Court of Appeal concurred, was right, and ought to be affirmed.

The question of the barony of Castel Cicciano remains. That barony, to which a territorial jurisdiction, civil and criminal, was anciently attached, was in the old law, established under the Frank Princes in Naples and Sicily, a "hereditary" or "mixed" feud, alienable with, but not without, the Royal consent. The original grant does not appear to be now extant; but by a series of alienations, during the sixteenth and seventeenth centuries, it became vested in Paolo and Beatrice Testaferrata, the common ancestors under whom both the parties to this contest claim. The history of the tenure of such baronies, and of the law applicable to them, was discussed with much learning by Dr. Gasan, the judge of first instance; and their Lordships adopt his conclusion, that, however the case may have been before the commutation in the thirteenth century of the military service due from barons, females as well as males were, after that commutation, capable in the ordinary course of law of succeeding to them; and this particular barony appears, at different times, to have been held by females.

If Fabrizio Testaferrata had power to impress upon this barony, by his own sole act, the character of a "majorat," descendible to the male descendants of his daughter Clara, in exclusion of all female heirs as long as there were such male descendants, he did so by his will, dated the 12th of August, 1744. He thereby nominated her his successor in the barony (as, indeed, she would have been, if he had not done so), annexing it to that primogenitura, as to which the opinion of their Lordships has been already expressed. The Court of first instance held that this was validly done; but, on appeal, that judgment was

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reversed. The question which their Lordships have now to consider is, whether it was validly done, so far as relates to the succession now in dispute, or not?

The necessity for the royal consent to the creation of such a majorat of such a feud is said by the appellant Salvatore to have been removed by a constitution of Philip the Fourth, King of Naples, dated in 1655, and known as the "Pragmatic," No. 34; and it is admitted that, as to "feuds which were still governed by the law only," and the succession to which "had not been already established by a disposition legally laid down" by a prior holder, this might be done, for four generations or degrees. But it was held by the Court of Appeal that it could not, even in that case, be done beyond the fourth degree from Fabrizio; and that the appellant Salvatore (and Alessandro his brother) were more than four degrees removed from Fabrizio. And it was also held that the course of succession to this barony had been established in favour of the "regular" lineal descent by a prior disposition, made in 1613, which Fabrizio was not enabled, by the Pragmatic No. 34, or otherwise, to alter; and, therefore, that his will did not, and could not, give Salvatore any title as against Alessandro's female lineal heir. Their Lordships, having to examine the correctness of these propositions, will first consider under what title the barony was held by Fabrizio, when he made his will. He took it from his parents, Paolo and Beatrice Testaferrata. Beatrice, who was the youngest of five daughters of Pietro Cassia (all married, whether in their father's lifetime or not), took it by way of donation or dotation from her father, by a settlement made on her marriage on the 20th of January, 1674, which had the Royal assent. Pietro took it as heir of his parents, Giacinto Cassia, and Maddalena, daughter of Ascanio Surdo. Maddalena (who had brothers then living) took it on her marriage on the 28th of February, 1613, by a dotal settlement from her father, Ascanio. That settlement was conditional on the Royal assent. It provided, by way of *fidei-commissum*, that the barony should descend "*ad filios mares ipsius dominæ Magdalenæ sponsæ, nepotes ac posteros per directam lineam legitime descendentes primogenitos, et in defectu secundogenitos, et in gradu et ordine successivo; ita quod mares semper feminis præferantur usque*

ad infinitum, ordine primogenituræ de primogenito in primogenitum servando." It also contained an absolute prohibition against alienation:—but, on the other hand, it was expressed to be "*feudi natura in aliquo non mutata.*" This destination has been interpreted by the Court below to be "regular," i.e., to carry the succession to female lineal heirs as against male collaterals, giving a preference to males only when they were in the same line and in equal degree; and their Lordships assume the correctness of that construction. They also agree with the Court below in thinking that as the barony was actually enjoyed under this settlement for more than sixty years, and came by virtue of it to Pietro Cassia, who made the settlement on the marriage of Beatrice, all reasonable presumptions in its favour, necessary to support that enjoyment, ought to be made. So far, therefore, as the Royal assent was necessary for that purpose, their Lordships agree in thinking that it ought to be presumed. But the principle does not require their Lordships to presume more than was necessary for that purpose, especially if it would be inconsistent with the actual possession and enjoyment, after 1674, when the settlement on Beatrice was made. If, for example, the prohibition of alienation could not take effect without altering "the nature of the feud" (for which proposition there seems to be authority in Sorge, tom. v., p. 50), and if to the Royal assent the condition "*feudi natura in aliquo non mutata*" (found in the deed itself) might have been annexed, the presumption most consistent with all the facts of this case might be, that the Royal assent was given in that form; in which case there would seem to be enough to support the course of succession of the feud prescribed by the dotal deed but not enough to make the prohibition against alienation effectual. Sorge says:—"Animadvertendum est, quod feudatarius non potest absque Assensu prohibere alienationem seu pignorationem. . . . Idque omnino confirmatur ex eo, quia si hoc esset, staret in facultate defuncti mutare feudi hereditarii naturam, et de feudo hereditario illud absque Domini Assensu ex pacto efficere, quod de jure nullo modo sine Regis expresso consensu fieri potest. . . . Est enim indubitatum, quod feudum ex pacto illud dicitur, quod nec alienari, nec pignorari, nec in aliquo successoribus a prædecessoribus prejudicari potest."

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There is an example of Royal assent under the condition "*natura feudi in aliquo non mutata*" in the Record. Before their Lordships could decide this case upon the ground that the deed of Ascanio Surdo established an order of succession which no subsequent holder of the feud could alter, even with the Royal assent, they would desire to receive more light than has been afforded them in the judgments below, or by the arguments at the bar. Both parties put the deed of Ascanio Surdo in evidence; but their Lordships do not think that the appellant, Salvatore, did so for any purpose which should estop him from maintaining (if he can) that it was not operative after the 20th of January, 1674.

If neither of these parties can be heard to deny that the deed of Ascanio Surdo was so far effectual as to govern the title from 1613 to 1674, still less is it open to either of them to call in question the title created by the settlement of the 20th of January, 1674. If Beatrice took under an alienation of the barony made by her father on the assumption that he could so alienate it with the Royal assent, and not as successor to him in the order of succession appointed by the deed of 1613, it seems to their Lordships impossible to hold that the question between the present parties can depend upon that order of succession. There had been, at the time of Alessandro Sceberras' death, an enjoyment of more than 200 years under Pietro's settlement on Beatrice and her descendants; and, as between these parties, the earlier could not be set up against the later deed, under which they both claim.

Their Lordships have already mentioned, that Beatrice was the youngest of five daughters of Pietro Cassia, all married (as for this purpose they are willing to assume) in his lifetime. A pedigree was put in evidence (prepared, manifestly, for the purpose not of this, but of some other litigation between other parties), by which it appears that Domenica, the eldest sister of Beatrice, left issue, the line of whose descendants continued at least as late as 1856. It was probably not necessary, for the purpose for which that pedigree was prepared, to shew, either when the other sisters married, or whether they had issue or not. Their Lordships have no materials before them on which to

found any presumption, one way or other, as to those facts. The pedigree shews that there was also a brother, Paolo, who died without issue; his death before the marriage of Beatrice might perhaps have been presumed, if that had been the only difficulty in the case.

It seems, at first sight, clear, that according to the course of succession to the barony established by the settlement of Ascanio Surdo, if that was a perpetual primogenitura, unalterable even by an alienation made with the Royal assent, it never could have come to Beatrice. All her sisters, and all their issue, in the order of seniority, were entitled to take before her; and her eldest sister, at least, left issue, whose line may be yet in being. In the judgment of the Court below it is expressly stated, that "the passage of the barony from Pietro Cassia to Beatrice was not in conformity, either with the rules of feudal succession in the kingdom of Naples, or with the primogenial *fidei-commissum* established by Ascanio Surdo." But, nevertheless, "the acquiescence of Domenica Cassia, and her descendants, up to the present day," was regarded by that Court as placing "the legality of that apparently irregular succession" beyond doubt, in whatever way it might have occurred; the view of the Court being, that it ought still to be regarded as governed, in some way, by the deed of Ascanio Surdo. The Court suggested, as a possible explanation, that there might have been a renunciation by Domenica, for herself and her descendants; referring to a passage in Sorge's Treatise (tom v., cap. 41, num. 6), as authority for the proposition, that it was competent to her to make such a renunciation, and that it would not require the Royal assent; and they proceeded to speculate on the possibility of its having been made after the death of Pietro (the authority quoted seeming to shew that it could not be made so as to bind her descendants unless she were living when she might have succeeded), by reason of some bequest in Domenica's favour in his will.

Their Lordships have examined the section of Sorge's work, to which the Court for that purpose referred; but it appears to them to refer only to the renunciation, by a parent for his issue, of a succession depending upon the ordinary law of feuds, and

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not to one inalienably settled by a perpetual primogenitura. If the effect of Ascanio's deed was to establish a course of succession unalterable by any holder of the feud, even with the Royal assent, their Lordships would desire to be satisfied by some more clear authority that Domenica could alter it, so as to exclude not herself only but the whole line of her descendants, by renunciation either in her father's lifetime or afterwards,—much more, that mere acquiescence, under the circumstances of this case, could be held equivalent in legal effect to such renunciation. And it would further have to be shewn, even if such a renunciation might be effectual against the issue of Domenica, how it could enable her father, passing over his second, third, and fourth daughters, and all their actual or possible issue, to give the barony to Beatrice. To presume renunciations by them all, for themselves and all their issue (if the law would have given effect to them), seems to their Lordships less reasonable, than to suppose, either that the quality of inalienability was never effectually attached to the feud, or that all those members of the family were simply passive and acquiescent in an act of alienation prejudicial to them, which their father had taken upon himself to make, to which the Crown had assented, and which they might not have thought open to challenge, even if it was so in law. The internal evidence of the deed of the 20th of January, 1674, seems to their Lordships adverse to the supposition that it was either founded upon any renunciation or renunciations by Domenica or her sisters, or was intended by the parties to it to be governed in any way by the order of succession prescribed in Ascanio Surdo's deed. To presume renunciations afterwards, if there were none before, would not seem to their Lordships reasonable; and, if there had been any before, it is hardly possible that evidence of them should not have been preserved in some notarial acts, and that no mention of them should be made in the deed of the 20th of January, 1674, itself. In that deed there is no recognition of or reference to Ascanio Surdo's settlement, or the course of succession under it. Their Lordships cannot read or understand it otherwise than as a settlement, which was at least intended by the parties to it to have an independent operation. It says that Pietro Cassia "*dedit, donavit, et donat, et causa*

dotis concessit et concedit domino Paulo Testaferrata, sponso præsenti et ab eo recipienti in dotem pro dote, ac titulo et causa dotis prædictæ dominæ sponsæ, pro se et suis descendentibus in perpetuum, supradictam Baroniam . . . ad habendum per dictum dominum sponsum præsentem, et stipulantem nomine dictæ dominæ sponsæ, pro se et descendentibus suis." The effect of these words, as a new destination of the barony, is not altered, in their Lordships' judgment, by the ordinary words of style by which Pietro purported to make the grant, "*modo et forma ac prout et quemadmodum ipse . . . dictam jurisdictionem et officium melius et plenius habuit, tenuit, et possedit,*" and by virtue of every right and title, public or private, which he might have in the premises. The *fidei-commissum* of Ascanio Surdo, established by the previous deed, was not of "the nature of the feud."

The Court of Appeal went further than to make presumptions which their Lordships cannot see their way to adopt, for the purpose of reconciling the deed of 1674 with that of 1613. They added what, if correct, might make such presumptions superfluous,—that if, by the donation of Pietro to Beatrice, the disposition of Ascanio Surdo was, "*pro hac vice*," set aside, Beatrice was nevertheless seised under that disposition, as "among the rules governing the barony." Their Lordships have much difficulty in following this view, or in understanding the application of the words "*pro hac vice*" to the facts. The order of succession appointed by Ascanio Surdo's disposition, if set aside at all, was set aside permanently, and not only for a time. A particular *fidei-commissum*, established by any holder of the feud with the Royal assent, and not in itself repugnant to the nature of the feud, was (as their Lordships understand the law) a different thing from a "rule governing the barony" for all time, into whatever hands it might come.

Another solution of the difficulty, which does not seem to have been suggested or considered in either of the Courts below, was put forward by the counsel for the respondent in the second appeal at their Lordships' bar. It was contended that, according to the Neapolitan Frank law, the succession to the barony would devolve from Pietro to a younger unmarried, in preference to an elder married daughter; and, therefore, that at the time of her

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marriage (if her sisters were then already married) Beatrice would have been the heir next entitled to succeed. This contention appears to rest upon a constitution of the Emperor Frederic II., "*De successione nobilium in feudis*" (Lindenbrog. *Cod. Legum antiquarum*: Constitutionum Neapolitanarum sive Sicularum, lib. 3, tit. 24, § 2). It contains provisions regulating the ordinary law of succession to feuds; among which is one in these words:—"*Filiæ autem in capillo, post mortem patris in domo manentes, majores sorores conjugatas et dotatas de bonis patris excludunt. Cæterum si de bonis paternis dotatæ non sunt majores, minoribus præferantur, si jure Francorum vivant.*"

Their Lordships, for the purpose of considering this argument, will assume (though the fact does not appear, one way or the other), that Beatrice was the only daughter of Pietro Cassia remaining unmarried or unendowed on the 20th of January, 1674. The first question is, whether this law of Frederic II. applied at all to a succession under a perpetual and unalterable majorat or *primogenitura*, such as the argument assumes to have been created by the settlement of Ascanio Surdo. It does not appear to their Lordships, according to its natural construction, to extend to such a case. What was said in the leading judgment of the Court of Appeal as to the Pragmatic Sanctions appears to be no less applicable to this constitution. They "evidently referred to feuds which were still governed by the law only, and not to feuds the succession to which had been already established by a disposition legally laid down by one of the previous holders." Even if this had been otherwise, the case of Beatrice, in January, 1674, would not appear to fall either within the letter or within the spirit of that Constitution. Not within the letter, for the Constitution dealt only with the succession after the father's death, and gave a preference only to those daughters who might remain unmarried in their father's house after his death. And as this dotation was upon the marriage of Beatrice, and made solely with a view to that marriage, it would seem to be altogether opposed to the spirit and substance of that Constitution to found upon it a preference of Beatrice by her father in his lifetime, as a *married* daughter.

Their Lordships are, therefore, unable at present to accept

either the hypothesis of a renunciation by Domenica, or the argument founded upon the Constitution of the Emperor Frederic II.; and it would seem to follow, that the title of Fabrizio Testaferrata to this barony cannot have been governed by the order of succession prescribed by Ascanio Surdo's settlement. But, owing to the course which this part of the argument followed in the courts below, the difficulties now presented were not dealt with, and it would be more satisfactory to remit the whole case, as to the barony, for further consideration.

Supposing that Ascanio Surdo's settlement is not now operative, the only remaining question would be what was the effect upon the barony of the will of Fabrizio? He held under the settlement of the 20th of January, 1674, not on the terms of any majorat or primogenitura, but with a simple destination to his descendants generally; and it appears to their Lordships that, according to the view of both the Courts below, this would have enabled him to settle the barony by his will, so as to create a majorat, in any manner and to any extent authorized by the Pragmatic, No. 34, of Philip IV. The only reason why the Court of Appeal held that he could not do so was, because they considered him to hold under, and upon the terms of, Ascanio Surdo's settlement of 1613. But the Court of Appeal held that any such majorat or primogenitura, created by the will of Fabrizio, could not endure, so as to give a preference to male collaterals over female descendants of the last holder of the barony, beyond the fourth degree or generation, reckoned downwards from Fabrizio himself (Clara, the daughter of Fabrizio, being in the first degree); a rule which would exclude the appellant Salvatore from the succession. The Court of Appeal treated that point as depending upon the question, whether Clara, as "institute," was to be included in or excluded from the computation of those four degrees; and it seems to have been so argued, on both sides, before that Court, as it was also before their Lordships, until a different view of the meaning of the "fourth degree," in the Pragmatic of Philip IV., suggested itself during the course of the argument. Their Lordships would not differ on this point from the conclusion of the Court of Appeal, if they were satisfied that a correct view had been taken of the meaning of

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the "fourth degree" in the Pragmatic of Philip IV.; and they would not think it satisfactory finally to decide that point in the appellant Salvatore's favour, until it had been argued and considered by the Court of Appeal in Malta, where perhaps some new light might be capable of being thrown upon it. On the other hand, as the judgment of the Court of first instance, as to the barony as well as the primogenitura, was in Salvatore's favour, and as their Lordships do not at present see their way to agree with the Court of Appeal as to the materiality of the settlement of Ascanio Surdo to the controversy, they cannot affirm the decision of the Court of Appeal as to the barony, without being first satisfied (which at present they are not) that the construction placed in that court upon the Pragmatic of Philip IV. was right. They propose therefore (as has been said), to remit this part of the case (not at present finally deciding any question as to the barony) for further consideration by the Court of Appeal. But for the assistance of that Court, they think it desirable to state on this last, as on the former points, the impression which (subject to any new light which may be capable of being thrown upon the matter), has been produced upon their minds by the arguments which they have heard.

Three Pragmatics were referred to. The first of these (that of Philip II., made in 1595, and numbered 33) does not appear to their Lordships to be material.

The second, on which the question directly turns, is that of Philip IV., made in 1655, and numbered 34. This appears, on its face, to have been founded upon a petition from the city and baronage of Naples for some reward for services to the Crown; and the King having offered (among other things) "the *enlargement and extension* of the succession to feuds *up to the fourth degree inclusive*, being male descendants of the first acquirer," and also "*that each feud holder might create a majorat on his feuds*," they asked, that both those favours might be granted; and that the former of them should be granted in favour of "as well males descending from females or from males, as females descending from males or from females, which should be in the said fourth degree, capacitating them for the said succession indifferently, *so that all that which was observed in succession to feuds up to the*

third degree, should be observed in favour of those comprised in the fourth." In accordance with this petition, the King granted "the aforesaid "*amplification and extension* in the succession of feuds . . . ., *so that all that which was observed about the succession of feuds to the third degree be observed, and ought to be observed, for the benefit of those included in the fourth degree,* both males and females," derogating "from any Pragmatic Constitution or other law, royal or municipal, of the kingdom of Sicily, which excluded *the aforesaid amplification.*" And he further conceded to the same noblemen, that any of them might *found majorats* in their feuds, *within the limits, however, of the permitted succession, as above, so that the onus of restitution or fidei-commissum do not extend any further, in detriment of the right of devolution,*" competent to the Crown.

The question turns upon the meaning of the words limiting the power to found majorats, "within the limits of *the permitted succession, as above.*" Even if they had not been interpreted by any later Constitution, their Lordships would have understood them as referring to the same "fourth degree," which was the limit of the preceding "amplification and extension in the succession of feuds." The later Pragmatic of the Emperor Charles VI. (made in 1720, and numbered 38), confirms that construction, saying that, "by favour of Philip IV. it was granted, that the said feud-holders could *create fidei-commissa and majorats, up to the fourth degree only, then only capacitated to the succession to the feuds.*"

This being so, it is apparent that this Constitution cannot be properly understood without reference to that previous legal limit, to the *third* degree, which was now to be "amplified and extended," so as to include the fourth. The previous law, to which reference was made, appears to be contained in the same Constitution of the Emperor Frederic II., which has been already mentioned for another purpose; which was not, however, referred to at all in the Court of Appeal, nor before their Lordships until a late stage of the argument.

The Constitution of the Emperor Frederic established, as general law, an order of succession to feuds held "*in capite*" of the Crown, unlimited and extending *ad infinitum* as to all lineal

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descendants, male and female, of the holder of the feud; but it limited the right of collateral succession to the collaterals of the last holder within the third degree inclusive; so that, if on the death of a holder it were found that he had no lineal heir, and no collateral heir of the first, second, or third degree, the feud would lapse, or "devolve" to the Crown." The words are:—

"Nec non majoris ætatis, inter eos qui vivunt in Regno specialiter jure Francorum, ex collaterali linea venientes, ut fratres, sive ex utroque parente, sive ex altero tantum, et sorores in capillo, excluso etiam communi patre superstite, omnino succedant; conjugatæ autem et dotatæ a fratrum successionibus repellantur. Filii autem fratrum, in his quæ communis patris fuerunt, avi eorum scilicet, idem jus quod pater eorum habeant. *In acquisitis autem patruo ex largitione nostra, vel quolibet titulo, jure suo nepotes ex fratribus non succedunt. In ulteriore autem gradu positis, scilicet filiis nepotum ex fratribus et sequentibus, in his etiam quæ communis proavi fuerunt, successio non defertur.*"

Having regard to this law, which did not limit lineal succession at all, but limited collateral succession to the brother's son (reckoned, as their Lordships understand it, from the last holder of the feud, though it might be one which had been inherited from a common ancestor), the effect of the Pragmatic of Philip IV. seems to be to extend and amplify the collateral succession, so as to admit one degree more, leaving the lineal succession unlimited as before. And that construction seems to be supported by the context; the words (as to majorats), "within the limits of the permitted succession, as above," being followed by these, "*so that* the onus of restitution or fidei-commissum *do not extend any further in detriment of the right of devolution competent to us and our Royal Court.*" As long as the lineal succession from the last holder continued, there would be no right of devolution to the Crown; such devolution could only take place when there were no lineals, and no collateral "within the limits of the permitted succession."

Applying this rule of succession to the present case, the appellant Salvatore would seem to be entitled to succeed under the majorat created by the will of Fabrizio, whether the descent were reckoned from Clara, the "institute" under that will, or (which

their Lordships think the more correct view) from Alessandro, the last holder. If reckoned from Clara he is her lineal descendant; and the succession of all lineal descendants, without limit, was allowed. If from Alessandro (as their Lordships think it ought to be), the half-brother is a collateral within the limits of the permitted succession. If, indeed, there were any settled usage or interpretation of these laws, at variance with what appears to be their natural construction, that usage or interpretation might prevail.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, so far as relates to the primogenitura; and, as to the barony, to remit the case for further consideration to the Court of Appeal in Malta; discharging in the meantime, without prejudice to any question, the judgment, as to the barony, of that Court. The costs of the first appeal must be paid by the appellant; those of the second appeal must follow the result.

Solicitors for appellant: *Ward, Mills, Witham & Lambert.*
Solicitors for respondent: *Leathley & Phipson.*

[PRIVY COUNCIL.]

J. C.* 1888 July 7.

BAUDAINS . . . . . APPELLANT;

AND

LIQUIDATORS OF JERSEY BANKING COMPANY . . . . . } RESPONDENTS.

EX PARTE BAUDAINS.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Practice—Special Appeal—Improper Concealment of material Facts in the Petition—Judge's Notes of Evidence.

Where judge's notes of evidence are mere private memoranda, and are not taken in pursuance of any law or practice requiring them, *held*, that it would be improper to have them before a Court of Appeal.

Where an order granting special leave to appeal had been made upon a petition which improperly concealed from their Lordships the ground upon which the appeal had been refused by the Court below, *held*, that a subsequent petition that further evidence be taken must be refused, as nothing will be done to assist an appeal so instituted.

THIS was a petition by the appellant for an order that the Royal Court of Jersey, or the bailiff or greffier thereof, might be directed to transmit without delay the notes of evidence taken by the bailiff on the hearing of the petitioner's appeal from the judgment of the Inferior Number of the said Court, or an authenticated copy of such notes; and for further relief.

Jeune, Q.C., and *Mulligan*, for the petitioner.

Sir *Horace Davey*, Q.C., and *Fishbourne*, for the respondents.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This is an application that the Royal Court of Jersey, or the bailiff or greffier thereof, may be directed to transmit to the Registrar of the Privy Council without delay, the notes of

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

evidence taken by the bailiff of the said Court on the hearing of the appeal in this case. Those notes are the notes of the judge; and in cases where it is the judge's duty to take notes it may be most proper to have the judge's notes before the Privy Council—in fact it is a matter of common practice in jury trials; but by the law and practice of Jersey it is not the judge's duty to take notes; on the contrary the judge appears to be forbidden to take notes which shall form part of the record. In that case the judge's notes are mere private memoranda for the assistance of his own memory; and he may only take down such points as he desires to direct his own attention to in the conduct of the case. Such notes might be misleading to the last degree. There might be an important point taken down for one party, and the counter point for the other party, which would qualify it, not taken down; and though such notes might suit the purpose of the judge very well, it would be very improper to have them before the Court of Appeal. The prayer of the petition therefore cannot be granted.

But the petitioner goes on to pray further relief; and though he does not in his petition point to the taking of further evidence in Jersey under the order of Her Majesty in Council, he now asks at the bar that such further evidence shall be taken. Their Lordships agree that it is quite competent to them to take such further evidence in a proper case; but in this case they are not disposed to give any assistance to the petitioner. The ground on which the Royal Court of Jersey refused leave to appeal was that there were no formal notes in writing taken during the trial. The rule of practice is laid down in an article passed in the year 1885, which, rendering it in English, is as follows:—"It shall not be permissible to either party after the evidence in the case has begun to demand that the depositions shall be reduced into writing except in a case susceptible of appeal to Her Majesty in Council;" and then:—"The reduction into writing shall be demanded when the evidence is entered on." In this case there was no such demand, and there was no reduction into writing; and on that ground the Royal Court thought that they ought to refuse the leave to appeal. Their Lordships do not desire to pronounce any opinion in this case whether the omission to

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demand the formal reduction into writing should be an absolute peremptory ground for refusal of appeal in every case; but applying themselves to the case before them they find that it was in fact the ground on which the leave to appeal was refused in the present case. When the petitioner applied for special leave to appeal from that order he did not disclose the ground on which leave had been refused by the Court. If he had disclosed it, the matter which is now debated on this petition would have been debated when the leave to appeal was applied for, and it is a matter which might well have influenced their Lordships' decision. Now until the filing of the affidavit of the greffier of the Royal Court in this case, it did not appear what was the ground for refusing the leave to appeal. M. Baudains the petitioner, who himself is a lawyer, has answered that affidavit, and he says in his affidavit in answer that he is not aware of any law under which the want of such formal reduction into writing is a ground for refusing leave to appeal. But he does not state that he could not have found out what the real ground for refusing the leave to appeal was, so as to let this Committee know it when they were asked to grant special leave to appeal. He does not even state that he does not know that ground, or that he did not know it when he presented his petition. The result is that their Lordships have been induced to make an order upon imperfect materials, and in the absence of materials which might have influenced their judgment when they made that order. It is a matter of extreme importance that a party should bring before their Lordships all that is material to guide their judgment; otherwise orders may be made here, and are made sometimes, in the absence of knowledge of what ought to be known; and an amount of trouble, disturbance, and expense is caused to the parties, which is of great public mischief. The least that a petitioner can do who has—speaking in no invidious sense, not imputing any intention to M. Baudains—but who has in fact misled their Lordships by presenting a petition not stating the true nature of the question raised in the Court below—would be to come forward at the earliest moment to say that he did not know, that he could not by ordinary inquiry have known, what the grounds of the judgment were, and therefore to excuse

himself for not having brought the proper materials before this Committee. M. Baudains has not done that. He has had his attention drawn to the fact by the affidavit of the greffier; he has answered the affidavit of the greffier on a matter of law; and he has not answered the affidavit of the greffier on the much more important matter of fact.

The case therefore is one in which their Lordships are not disposed to lend any assistance to the petitioner; and in the exercise of their discretion they will humbly advise Her Majesty to dismiss this petition with costs.

Solicitors for petitioner: *Saunders, Hawksford, Bennett, & Co.*
Solicitors for respondents: *Taylor & Co.*

END OF VOL. XIII.

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ARREST—*Practice — Imprisonment for Debt — Judgment Summons—Order for Commitment of Debtor—Jurisdiction—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.] Judgment having been recovered against a defendant in a county court an order for payment of £20 was made. The defendant having made default in payment thereof a judgment summons was taken out, and the judge having heard evidence and being satisfied as to the defendant's means made an order to commit him to prison for ten days, but directed that the warrant should be suspended if the debtor paid instalments of £4 a month, the first payment to be made in fourteen days.—*Held*, reversing the decision of the Court of Appeal (18 Q. B. D. 213), that the order was in reality an order for commitment in respect of the past default in payment of the £20, and not an anticipatory order for commitment in respect of any future default; and that this being so the order was valid under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5. STONOR *v.* FOWKE - - 20

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BANKER—*Pledge—Deposit by Money-Dealer of his Customers' Securities — Estoppel — Foreign Bonds payable to Bearer—Negotiable Securities—Purchaser for Value without Notice—Notice of Infirmity of Title in Pledgor.*] S. gave to E. certificates of railway stock with transfers thereof executed by him in blank, and bonds of foreign companies (alleged to be negotiable securities), for the purpose of raising £26,000. E. gave these securities to M., a money-dealer in London, to secure £26,000 advanced by M. to E. M. deposited the transfers and securities, together with other securities of his customers, with various banks, as security for large loan accounts running between him and them, the blanks in the transfers of stock being filled up with the names of nominees of the banks. The banks in so dealing either actually knew, or had reason to believe, that the securities did or might belong not to M. but to his customers. M. having become bankrupt, the banks sold some of S.'s securities, and claimed to hold the proceeds and the unsold remainder as security for all the debt due from M. to them:—*Held*, reversing the decision of the Court of Appeal (34 Ch. D. 95), that though the banks had the legal title to the securities, they were not purchasers for value without notice, but ought to have inquired into the extent of M.'s authority, and this whether the securities were negotiable or not; and that upon payment to the banks of the money advanced by M. to E., S. was entitled to the value of such of the securities as had been sold by the banks, and to redeem the remainder. EARL OF SHEFFIELD *v.* LONDON JOINT STOCK BANK - - - - - - 333

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49.] The assignee of a lease for a term of years covenanted to indemnify the lessees against damages for breach of their covenants with the lessors to repair and yield up the demised premises in repair at the end of the term. Eight years before the time expired, the assignee filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, and obtained an order of discharge. The lessees were not scheduled in the debtor's statement of affairs, no notices were sent to them, and they tendered no proof in the liquidation in respect of the assignee's possible liability at the end of the term upon his covenant to indemnify. After the term expired, the lessors having recovered damages against the lessees upon the covenants for repair, the lessees claimed an indemnity from the assignee in respect of his covenant to indemnify:—*Held*, affirming the decision of the Court of Appeal (*Morgan* v. *Hardy*, 18 Q. B. D. 646), that the claim of the lessees was barred, under sect. 49 of the Bankruptcy Act, 1869, by the order of discharge, the effect of sect. 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the liquidation, unless an order of the Court declared it to be a liability incapable of being fairly estimated. Hardy *v.* Fothergill [351

2. —— *Examination of Debtor's Property—Duty of Debtor to aid in Realisation of Property—Insurance of Debtor's Life — Submission to Medical Examination — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 24, 28.] The principal asset of a bankrupt was a contingent reversionary interest which was saleable if the bankrupt's life were insured. The trustee having requested the bankrupt to submit to a medical examination with a view to a policy being effected, the bankrupt refused to do so without giving any reason, although he had not long before his bankruptcy submitted to such an examination for the purpose of raising money on his interest, and although he admitted that since then he had contracted no disease, and that he knew of no reason why he should not submit to such an examination:—*Held* (Lord FitzGerald dissenting), that the obligation imposed upon a bankrupt by sect. 24 of the Bankruptcy Act, 1883, to "do all such acts and things in relation to his property, and the distribution of his property among his creditors, as may be reasonably required by the trustees" and to "aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors," did not include an obligation to submit to a medical examination, and that the refusal to submit was not a ground upon which the bankrupt's discharge could be refused or suspended under sect. 28.—The decision of the Court of Appeal (19 Q. B. D. 39) affirmed. Board of Trade *v.* Block - - - - 570

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BILL OF SALE—*After-acquired Property, Assignment of—Chose in Action—Assignee, Title of—Future Book Debts—Specific Performance.*] A bill of sale assigned (inter alia) all the book debts due and owing or which might during the continuance of the security become due and owing to

BILL OF SALE—*continued.*

the mortgagor:—*Held* (Lord FitzGerald neither assenting nor dissenting), that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business.—The decision of the Court of Appeal (18 Q. B. D. 25) reversed, and the decision of Hawkins and Mathew, JJ. (17 Q. B. D. 88) restored.—*Belding* v. *Read* (3 H. & C. 955) and *In re D'Epineuil* (20 Ch. D. 758) overruled.—*In re Clarke, Coombe* v. *Carter* (36 Ch. D. 348) approved. Tailby *v.* Official Receiver - - - - 523

2. —— *Invoice and Receipt—Mortgage—Assurance of Chattels—Hire and purchase Agreement—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Railway Wagons—Hiring Agreement.*] The B. Company, being in want of money and being in possession of certain wagons in which they had an interest, applied to the respondents, who agreed to buy the wagons for £1000, and advanced that sum, £257 thereof being paid to the owners of the wagons and the rest, £743, to the B. Company. The respondents received from the B. Company an invoice for the wagons and a receipt for the £743, and from the owners of the wagons a receipt for the £257. At the same time the respondents leased the wagons to the B. Company for three years, at a yearly rent payable quarterly, and calculated to replace the £1000 with seven per cent. interest, upon the terms that if all the payments were duly made the B. Company should have the option of purchasing the wagons at the end of the lease for a nominal sum, and that if the rent was not duly paid after demand the respondents should be entitled to repossess and enjoy the wagons as in their former estate, and that the agreement should thereupon cease and determine. The B. Company having made default in payment of the rent, the respondents claimed the wagons from a railway company into whose possession they had come, but were resisted on the ground that the transaction was void under the Bills of Sale Acts, 1878 and 1882, the documents not being in the form prescribed by those Acts for bills of sale.—*Held*, affirming the decision of the Court of Appeal (35 Ch. D. 191), that the transaction was in fact a purchase by the respondents, and was not a mortgage by the B. Company or a security for the payment of money; that the documents in question were not bills of sale within the Bills of Sale Acts, but that even if they had been, the respondents had made an independent title to the wagons. Manchester, Sheffield, and Lincolnshire Railway Company *v.* North Central Wagon Company - - - - - 554

3. —— *Validity — Schedule — Inventory of Personal Chattels — "Specifically described" — After-acquired Property—Form of Bill of Sale—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 5, 6, 9.] A bill of sale assigned by way of security for the payment of money chattels specifically described in the schedule to the bill of sale, "together with all other

BILL OF SALE—*continued.*
chattels and things the property of the mortgagor now in and about the premises [described], and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for or renewal of or in addition to the chattels and things hereby assigned by way of security for the payment of the" money.—The grantor's goods assigned by the bill having been seized under an execution, the grantee under the bill claimed the goods specifically described in the schedule and abandoned all claim to the rest:—*Held*, affirming the decision of the Court of Appeal (20 Q. B. D. 569), that the bill was not " in accordance with the form in the schedule to this Act annexed," as required by sect. 9 of the Bills of Sale Act (1878) Amendment Act, 1882, and was therefore altogether void, notwithstanding sects. 4, 5, and 6. Thomas *v.* Kelly - - - - 506

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See Domicil.

BUILDING SOCIETY—*Mortgage—Statutory Receipt—Successive Incumbrancers — Priority — Tacking—Right to call for Legal Estate—" Person for the time being entitled to the equity of redemption "—Building Societies Act*, 1836 (6 & 7 *Will.* 4, *c.* 32), *s.* 5.] H. mortgaged leaseholds to building societies established under 6 & 7 Will. 4, c. 32, and executed a second mortgage to the respondents. H. afterwards borrowed a sum from the appellants, part of the loan being applied in paying off the building societies, and the balance being paid directly to H., who executed a mortgage to the appellants to secure the loan. Upon being so paid off the building societies indorsed on their respective mortgages receipts to the mortgagor in accordance with 6 & 7 Will. 4, c. 32, s. 5, and delivered the indorsed deeds with the title deeds to the appellants. Neither the building societies nor the appellants had any notice of the respondent's mortgage. The respondents having brought an action against the appellants for foreclosure and sale:—*Held*, reversing the decision of the Court of Appeal, that the appellants' mortgage had priority over the respondents' mortgage, not only in respect of the moneys applied in paying off the building societies, but also in respect of the balance of the loan paid directly to H.—The decisions of Lord Cairns, L.C., in *Pease* v. *Jackson* (Law Rep. 3 Ch. 576) and of the Court of Appeal in *Robinson* v. *Trevor* (12 Q. B. D. 423) overruled upon this point. Hosking *v.* Smith - 582

CANADA, LAW OF—*Ontario—Compensation in respect of Death—Measure of Damages—Policy of Insurance—Revised Statutes of Ontario*, c. 135, *ss.* 2 & 3.] The right conferred by Lord Campbell's Act, adopted by Consolidated Statutes of Ontario, c. 135, ss. 2 and 3, to recover damages in respect of death occasioned by wrongful act, neglect or default, is restricted to the actual pecuniary loss sustained by the plaintiff.—Where the widow of deceased is plaintiff, and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased.—*Hicks* v. *Newport, &c., Railway Company* (4 B. & S. 403, n.) approved. Grand Trunk Railway Company of Canada *v.* Jennings - - 800

2. —— *Ontario—Incorporation of Railway Company—Validity of Municipal Bye-law—Conditions precedent—34 Vict. c. 48—37 Vict. c. 43.*] *Held*, that under Ontario Act, 34 Vict. c. 48, the Grand Junction Railway Company was recognised as an incorporated company; otherwise that it was actually incorporated by Act 37 Vict. c. 43; the effect of the two Acts being to give to the company so incorporated the benefit of a bye-law of the respondent corporation, which, under certain conditions, provided a bonus for the railway.—*Held*, further, that under the Act of 1871 the said bye-law was legal, valid, and binding on the corporation, but that the railway company had not on the evidence complied with the conditions precedent. The stipulated certificate of the chief engineer had not been produced, and although under paragraph 8 of the bye-law debentures might be delivered to trustees without a certificate, that applied to a time when the debentures or their proceeds were to be held in suspense, not to a time when the trusts were spent, and the payment, if made at all, should be made direct to the company. Grand Junction and Midland Railways of Canada *v.* Corporation of Peterborough - - - - - 136

3. —— *Quebec—Arbitration—C. C. P. art.* 1346—*Duties of Amiables Compositeurs.*] Arbitrators who are also appointed amiables compositeurs may, under art. 1346 C. C. P., dispense with the strict observance of those rules of law the non-observance of which as applied to awards results in no more than irregularity; they cannot be arbitrary in their dealings with the parties or disregard all law.—Where such arbitrators in good faith obtained from one of the parties in the absence but to the knowledge of the other correct information as to the law bearing upon the case before them, *held*, that that was not an irregularity which vitiated the award. Rolland *v.* Cassidy - - - - - 770

4. —— *Quebec—Law of Partnership—Power of Partners—Civil Code of Lower Canada, arts.* 1831, 1855.] One of three partners lent money on terms that the borrower, besides paying interest, should make over one-half his profits to the firm to which the lender belonged:—*Held*, that this agreement did not constitute a partnership between the firm and the borrower. One partner has no authority from the other partners to enter into a partnership with other persons in another business. Singleton, Dunn & Co. *v.* Knight - - - - - 788

5. —— *Quebec—Railway—Liability of Railway to Seizure and Sale—Dominion Act*, 46 *Vict*

CANADA, LAW OF—*continued.*

c. 24—*Quebec Act*, 43 *&* 44 *Vict. c.* 49, *s.* 11.] *Held*, that sect. 11 of Quebec Act, 43 & 44 Vict. c. 49, which provides that nothing in the Act shall affect suits then pending, applies also to proceedings in execution, and that therefore the property of a railway company governed by that Act was not precluded thereby from being attached in execution of the respondent's judgment against the company:—*Held*, further, that the railway undertaking in suit, which had become a Dominion railway before the respondent's writ of fi. fa. issued, and was governed by Dominion Act, 46 Vict. c. 24, could be seized and sold, subject to its mortgages, for the debts of the company to which it belonged. Redfield *v.* Corporation of Wickham - - - - - 467

6. —— *Quebec—Right of Suit by Trustees as distinguished from Mandatories—C. C. P. Art.* 19.] Article 19 C. C. P., is applicable to mere agents or mandatories. It is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate. —Where trustees sold property over which they had possession and title; *held*, that they were entitled to sue the purchaser to whom they had delivered possession, upon his covenant to pay the balance of the purchase-money.—*Browne* v. *Pinsoneault* (3 Sup. Ct. Can. Rep. 102) and *Burland* v. *Moffat* (11 Sup. Ct. Can. Rep. 76) overruled. Porteous *v.* Reynar - - - - 120

CAPE OF GOOD HOPE, LAW OF—*Bank-Notes in circulation or outstanding—Act* 6 *of* 1864, *sect.* 9—*Construction.*] Where a bank consisted of a head office and several branches, some of which as well as the head office issued notes, *held*, that by the true construction of Act 6 of 1864 a return of notes in circulation or outstanding need not include bank-notes, whether issued by the head or branch office, which at the date of such return are in possession of any office of the bank. Sect. 9 merely directs the mode of making the returns. It does not enlarge the basis of returns, nor treat every office of issue as, for the purposes of the Act, a separate and independent bank. Bank of Africa *v.* The Colonial Government - 215

2. —— *Power to compromise—Heir subject to a Fidei-Commissum.*] Where testator's daughter, on attaining the age of twenty-five, took the residue of his estate burdened with a conditional fidei-commissum, there being no bequest to the executors, who were only appointed administrators, the will not debarring the daughter from the inheritance as heir by birth, and at 25 as heir burdened with a fidei-commissum, and the daughter entered into an agreement of compromise with the executors of all her claims arising out of their administration of the testator's estate, which compromise did not involve any alienation of property:—*Held*, in a suit by her infant children for substantially the same relief as had been the subject of the said compromise, that they were bound thereby. The daughter, under the law of the Cape of Good Hope, fully represented the estate, and her children had the same interest as herself. De Montmort *v.* Broers - - 149

CARRIER—Railway company - - 31
See Railway Company. 1.

CASES—*Andrews* v. *Drever* (3 Cl. & F. 314) followed - - - - 613
See Tithes.

—— *Armstrong* v. *Lancashire and Yorkshire Railway Company* (Law Rep. 10 Ex. 47) overruled - - - - 1
See Ship. 1.

—— *Belding* v. *Read* (3 H. & C. 955) overruled
See Bill of Sale. 1. [523

—— *Bergheim* v. *Great Eastern Railway Company* (3 C. P. D. 221) disapproved 31
See Railway Company. 1.

—— *Browne* v. *Pinsoneault* (3 Sup. Ct. Can. Rep. 102) overruled - - - 120
See Canada, Law of. 6.

—— *Burland* v. *Moffatt* (11 Sup. Ct. Can. Rep. 76) overruled - - - 120
See Canada, Law of. 6.

—— *Clarke, In re, Coombe* v. *Carter* (36 Ch. D. 348) approved - - - 523
See Bill of Sale. 1.

—— *Crush* v. *Turner* (3 Ex. D. 303) approved
See Bill of Sale. 3. [506

—— *D'Epineuil, In re* (20 Ch. D. 758) overruled - - - - 523
See Bill of Sale. 1.

—— *Hicks* v. *Newport Railway Company* (4 B. & S. 403, n) approved - - 800
See Canada, Law of. 1.

—— "*Notting Hill*," *The* (9 P. D. 105), approved
See Damages. [222

—— *Pease* v. *Jackson* (Law Rep. 3 Ch. 576) overruled on one point - - - 582
See Building Society.

—— *Reg.* v. *Coaks* (3 E. & B. 249; 23 L. J. (Q.B.) 133) discussed - - - 241
See Municipal Corporation.

—— *Robinson* v. *Trevor* (12 Q. B. D. 423) overruled on one point - - - 582
See Building Society.

—— *Thorogood* v. *Bryan* (8 C. B. 115) overruled
See Ship. 1. [1

—— *Sailing Ship* "*Garston*" *Company* v. *Hickie* (15 Q. B. D. 588) discussed - 717
See Insurance—Marine. 2.

—— *Tootall's Trusts, In re* (23 Ch. D. 532) approved - - - - 431
See Domicil.

—— *Young* v. *Kitchin* (3 Ex. D. 127) approved
See Newfoundland, Law of. [199

CITY OF LONDON—Tithes - - - 613
See Tithes.

CLAY—Sand—Gravel—Not included in reservation of minerals - - - 657
See Scotch Law. 6. [20

CODE OF CIVIL PROCEDURE OF LOWER CANADA, Art. 19 - - - 120
See Canada, Law of. 6.

—— **Art. 1346** - - - - 770
See Canada, Law of. 3.

—— **Arts. 1831, 1855** - - - 788
See Canada, Law of. 4.

COLLISION - - - [1, 454, 455, n.
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COLONIAL LAW—Canada.
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—— Cape of Good Hope - - 149, 215
See Cape of Good Hope, Law of. 1, 2.

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See Malta, Law of.

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See Newfoundland, Law of.

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—— Straits Settlement. - - - 192
See Straits Settlement, Law of.

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COMPENSATION—Death—Law of Ontario 800
See Canada, Law of. 1.

—— Water taken by Waterworks Commissioners
See Scotch Law. 1. [631

COMPROMISE—Power of trustee - - 149
See Cape of Good Hope, Law of. 2.

CONCEALMENT OF MATERIAL FACTS — Appeal - - - - - 832
See Practice. 5.

CONTRACT — *Misrepresentation — Rescission of Contract—Restitutio in Integrum — Indemnity—Damages—Partnership.*] The respondent was induced by misrepresentations made without fraud by the appellants to become a partner in a business which either belonged to them or in which they were partners, and which was in fact insolvent. The business having afterwards, owing to its own inherent vice, entirely failed with large liabilities:—*Held*, that the respondent was entitled to rescission of the contract and repayment of his capital, though the business which he restored to the appellants was worse than worthless, and that the contract being rescinded the appellants could not recover against him for money lent and goods sold by them to the partnership.—The decision of the Court of Appeal (34 Ch. D. 582) affirmed, but without deciding whether the appellants were liable to indemnify the respondent against the general liabilities of the firm. Adam *v.* Newbigging - - 308

—— Apportionment—Law of Newfoundland 199
See Newfoundland, Law of.

CORPORATION—Municipal - - 241
See Municipal Corporation.

COUNCILLOR—Election of - - - 241
See Municipal Corporation.

COUNTER-CLAIM — Unliquidated damages — Law of Newfoundland - - 199
See Newfoundland, Law of.

COUNTY COURT—Committal for non-payment
See Arrest. [20

—— Interpleader—Appeal - - - 506
See Practice. 6.

COVENANT—Joint and several - - 263
See Landlord and Tenant.

COVENANT—*continued.*

—— Running with land—Merger - - 279
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—— To repair—Liability - - - 351
See Bankruptcy. 1.

CROWN—Suit against—Tort - - 192
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CROWN LANDS—Gold mines - 227, 238
See Queensland, Law of. 1, 2.

—— New South Wales - - - 183
See New South Wales, Law of. 1.

CUSTOM OF TRADE — Bankers and money-dealers - - - - 333
See Banker.

DAMAGES—*Negligence—Nervous Shock resulting from Fright—Damages too remote.*] Damages in in a case of negligent collision must be the natural and reasonable result of the defendants' act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote.—*The Notting Hill* (9 P. D. 105) approved.—Where the gate-keeper of a railway company had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical and mental injuries occasioned by the fright:—*Held*, that the verdict could not be sustained, and that judgment must be entered for the defendants.—*Quære*, whether proof of "impact" was necessary to maintain the action. Victorian Railways Commissioners *v.* Coultas - - - - - 222

—— Collision—Loss of life - - - 1
See Ship. 1.

—— Contract—Rescission - - - 308
See Contract.

—— Measure of—Infringement of patent 401
See Patent.

—— Measure of—Compensation for death 800
See Canada, Law of. 1.

—— Unliquidated—Law of Newfoundland 199
See Newfoundland, Law of.

DEATH—Compensation for—Law of Ontario
See Canada, Law of. 1. [800

DEBTORS ACT - - - - 20
See Arrest.

DEPOSIT OF SECURITIES — Money dealer — Custom of trade - - - 333
See Banker.

DERELICT—Marine insurance - - 160
See Insurance—Marine. 1.

DESCENT—Law of Malta—Primogeniture 806
See Malta, Law of.

DISCHARGE—Bankruptcy - - - 351
See Bankruptcy. 1.

DISQUALIFICATION—Councillor - - 241
See Municipal Corporation.

DOCKS—*Ship—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 230—*Dock Tonnage Rates*—"*Trading inwards*" and "*Trading outwards*"—"*Arriving in ballast*"—*Arrival and Departure constituting one Voyage.*] Vessels took in part of their cargo at Glasgow, sailed to

DOCKS—*continued.*
Liverpool, entered the appellants' docks and there completed their loading but discharged no cargo: they then proceeded to a port in India, there discharged and loaded a complete cargo, thence sailed to Liverpool, entered the appellants' docks and there discharged the whole or part of their cargo, and then returned with the remainder of their cargo or in ballast to Glasgow:—*Held*, reversing the decision of the Court of Appeal (19 Q. B. D. 123), that under sect. 230 of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), such vessels using the appellants' docks as aforesaid on their way to India were liable to dock tonnage rates, not (as the Court of Appeal had held) as vessels "trading inwards" from Glasgow, but as vessels "trading outwards" to India; and that such vessels using the docks as aforesaid on their return voyage from India were liable to rates as vessels "trading inwards" from India. Mersey Docks and Harbour Board *v.* Henderson Brothers - - - 595

DOMICIL—*Law of Personal Status—Power of Testacy—Distribution—Turkish Domicil—British protected Subject—Chaldean Catholics.*] The testator, a member of the Chaldean Catholic community, having a Turkish domicil of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject:—*Held*, that he died domiciled in the dominions of the Porte, and that the Consular Court of Constantinople, being bound by sects. 5 and 6 of the Order in Council of 1873 to follow the same principles which would have been observed by an English Court of Probate, was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of the deceased and in distributing his effects.—There is no such thing as domicil arising from society and not from connection with a locality; consequently, as Cairo was not a British possession governed by English law, the testator's permanent abode therein under British protection did not attract to him an English or Anglo-Egyptian domicil.—*In re Tootal's Trusts* (23 Ch. D. 532) approved. Abd-ul-Messih *v.* Farra - - - - 431

—— Husband and wife—Infant domiciled abroad - - - - 88
See Scotch Law. 2.

EASEMENT—*Landlord and Tenant—Lease, Construction of—"Heirs or Assigns"—Easement, Regrant of by Lessee—Surrender of Lease—Merger in Reversion.*] D. and C., co-owners of an estate, by deed demised for a term of 1000 years a strip of land intersecting the estate for the purpose of making a canal, with the proviso that nothing should prevent D. and C. "their heirs or assigns" from using any of the land demised or any stream of water flowing over the same, or from granting any wayleaves across the same for the carriage of goods, &c., or for any other purpose in like manner as they could have used the same in case the lease had not been granted, but so as not to injure the canal. The canal was made, and the estate was afterwards partitioned by deed between D. and C., the reversion in a portion of the canal

EASEMENT—*continued.*
being conveyed to C., and the adjoining lands on each side of that portion being conveyed to D. C. afterwards conveyed the reversion in that portion of the canal to the lessees. D. as owner of the lands intersected by that portion of the canal having claimed to grant wayleaves, &c., and build a bridge across it for the purpose of making an access from one side to the other:—*Held*, affirming the decision of the Court of Appeal (33 Ch. D. 420), that upon the true construction of the lease the proviso operated as a covenant with D. and C. as owners of the reversion and not as owners of the adjoining lands; that this covenant ran with the reversion; and that when the reversion in that portion of the canal became vested in the lessees there was a merger and the rights under the proviso were extinguished as to that portion of the canal. Baron Dynevor *v.* Tennant 279

ELECTION—Councillor - - - 241
See Municipal Corporation.

EMBANKMENTS—Compensation for—Waterworks Commissioners - - 631
See Scotch Law. 1.

ESTOPPEL—Negotiable securities—Bonds payable to bearer - - - 333
See Banker.

EVIDENCE—English law—Judicial notice by Court - - - - 88
See Scotch Law. 2.

EXAMINATION—Debtor's property - 570
See Bankruptcy. 2.

EXECUTION—Seizure of railway—Law of Canada - - - - 467
See Canada, Law of. 5.

EXECUTOR—Scotch law—Warrandice - 81
See Scotch Law. 9.

FIDEI COMMISSUM—Law of Cape of Good Hope [149
See Cape of Good Hope, Law of. 2.

FOREIGN BONDS—Payable to bearer - 333
See Banker.

FRAUDULENT CONVEYANCE—Intention to defeat creditors - - - 497
See New South Wales, Law of. 4.

FRIGHT—Injury caused by—Remoteness of damage - - - - 222
See Damages.

HIRING AGREEMENT—Bill of sale - 554
See Bill of Sale. 2.

HUSBAND AND WIFE—Scotch law 88, 373, 385
See Scotch Law. 2, 3, 4.

—— Settlement by infant - - - 61
See Infant.

ILLEGALITY—Ratification—Absence of full knowledge - - - - 111
See Ratification.

IMPRISONMENT FOR DEBT - - 20
See Arrest.

INCOME TAX—*Revenue—Deductions from Profits—Part of Bank Premises used as Dwelling-house*

INCOME TAX—*continued.*
by Manager—5 & 6 *Vict. c.* 35, *s.* 100, *Sched. D., rules* 1 *of Cases I. and II.*] By 5 & 6 Vict. c. 35, s. 100, first rule, first case, the duties under schedule D. in respect of any trade are to be charged on a sum not less than the full amount of the balance of the profits of the trade "without other deduction than is hereinafter allowed;" and by the first rule applicable to the first and second cases in reference to such duties, no deduction shall be allowed for "any disbursements or expenses whatever, not being money wholly or exclusively laid out or expended for the purposes of such trade," &c., "nor for the rent or value of any dwelling-house, &c., except such part thereof as may be used for the purposes of such trade or concern not exceeding the proportion of the said rent or value hereinafter mentioned." — The respondents, a banking company, carried on their business in buildings which contained accommodation occupied as a dwelling-house by the manager or resident agent:—*Held*, affirming the judgment of the Court of Session as the Court of Exchequer, Scotland (14 Court Sess. Cas., 4th Series, 528), that the respondents were entitled to deduct from their profits before returning them for assessment under Schedule D the annual value of the whole bank premises, including the part occupied by the manager. Russell *v.* Town and County Bank - - - - 418

INFANT—*Married Woman—Ward of Court—Post-nuptial Settlement—Reversionary Interest in Personal Estate—Jurisdiction of Court—Infants' Settlements Act*, 1855 (18 & 19 *Vict. c.* 43).] The Infants' Settlements Act, 1855 (18 & 19 Vict. c. 43) removed the disability of infancy only, leaving unaffected the disability of coverture.—In 1862 an infant ward of Court married without the sanction of the Court. An inquiry as to her fortune having been shortly afterwards directed by the Court, a post-nuptial settlement was executed by her in 1863 with the approval of the Vice-Chancellor, whereby she settled her property, a reversionary interest in personalty under a will, upon trusts for herself for life with remainder for the children of the marriage. The testator having died before Malins' Act (20 & 21 Vict. c. 57) came into force, that Act had no application. There was issue of the marriage. During coverture the wife recognised the settlement by various acts, and after a dissolution of the marriage had been decreed on her petition, she successfully petitioned the Probate, Divorce and Admiralty Division to vary the terms of the settlement. The reversionary interest having fallen into possession after the dissolution of the marriage:—*Held*, affirming the decision of the Court of Appeal (35 Ch. D. 21), but without deciding whether the Infants' Settlements Act, 1855, applies to a post-nuptial settlement, that neither the sanction of the Court nor the effect of that Act could make the settlement of the wife's reversionary interest in personalty binding upon her; that no acts of acquiescence and confirmation could have that effect unless they amounted (which these acts did not) to an actual disposition by her of the property (while discoverte) to the trustees of the settlement, and that she was entitled to a transfer of the property. Seaton *v.* Seaton - - - - - - 61

INSURANCE—FIRE—Scotch law - - 699
See Scotch Law. 5.

INSURANCE—LIFE—Law of Ontario - 800
See Canada, Law of. 1.

—— Medical examination of bankrupt - 570
See Bankruptcy. 2.

INSURANCE—MARINE—*Actual total Loss—Sale of Ship by Court—Sale Proceeds less than Salvage Remuneration—Derelict.*] To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated.—Where a ship had been deserted by her master and crew, having been previously placed by them in a sinking condition, but had been subsequently taken possession of by salvors, towed into port, and there sold together with the cargo, by order of the Admiralty Court, for less than the actual cost of the salvage services:—*Held*, in actions upon policies on the ship and freight respectively, that, assuming the possession by salvors of a derelict vessel to be only a constructive total loss, the subsequent sale constituted an actual total loss of both ship and cargo. Cossman *v.* West. Cossman *v.* British America Assurance Company - - 160

2. —— *Meaning of "in Port"—Fairway of navigable Channel.*] A ship insured for a voyage to any port of discharge in the United Kingdom, "and whilst in port during thirty days after arrival," arrived at Greenock, discharged her cargo, and was placed in a dock for repairs. Within thirty days after her arrival she left the dock in ballast for the port of Glasgow, in tow of a steam-tug, to proceed on a new voyage, and had reached the fairway of the channel of the Clyde, her stern being about 500 feet distant from the harbour works, when she was capsized by a sudden gust of wind, and sustained damage:—*Held*, affirming the decision of the Court of Session (14 Ct. Sess. Cas. 4th Series, 544), that the ship at the time of the accident was not "in port" within the meaning of the policy, and that the underwriters were not liable.—*The Sailing Ship "Garston" Company* v. *Hickie* (15 Q. B. D. 580) discussed. Hunter *v.* Northern Marine Insurance Company 717

INTERPLEADER—Transfer to County Court—Appeal - - - - 506
See Practice. 6.

INVENTORY—Bills of Sale Act - - 506
See Bills of Sale. 3.

INVESTMENT—Trustee—Scotch law - 753
See Scotch Law. 8.

INVOICE—Receipt—Bill of sale - - 554
See Bill of Sale. 2.

JUDGE'S NOTES—Appeal—Evidence - 832
See Practice. 5.

JUDGMENT SUMMONS—Committal - 20
See Arrest.

JUS RELICTÆ—Claim to—Scotch law 88, 373
See Scotch Law. 2, 3.

LANDLORD AND TENANT — *Lease—Demise to two as Tenants in Common — Covenant, whether joint or several.*] Premises were demised to G. and A. "their executors, administrators and assigns," habendum to "the said G. and A. their executors, administrators and assigns as tenants in common and not as joint tenants" at a single yearly rent; and G. and A. covenanted "for themselves, their executors, administrators and assigns that they the said G. and A. or some or one of them, their executors, administrators or assigns" would pay the said yearly rent and keep the premises in repair. G. having died during the term, the lessor sued A. and the executors of G. for breaches of covenant occurring after G.'s death:—*Held*, that the covenants were in form joint and not several, and that G.'s executors were not liable.—The decision of the Court of Appeal in Ireland (20 Law Rep. Ir. 517) reversed, and the decision of the Irish Common Pleas Division (18 Law Rep. Ir. 263) restored. White *v.* Tyndall - - - - - 263

—— Reservation of easement—Merger - 279
See Easement.

LIABILITY—Incapable of being estimated 351
See Bankruptcy. 1.

LIEN—Railway company—Tolls - - 554
See Railway Company. 2.

LIMITATIONS, STATUTE OF — Law of New South Wales - - - 793
See New South Wales, Law of. 2.

—— Tithes - - - - - 613
See Tithes.

MALTA, LAW OF—*Construction—Primogenitura — Descent in an exclusively Male Line derived from a Female—Descent of a Barony established as a hereditary Feud—Pragmatic of Philip IV., No.* 34.] Where the founders of a Maltese primogenitura limited the succession by a deed of settlement in 1695 to the eldest and other sons of F., the original donee, and their respective male lines; then on failure of all those lines to his female issue and their respective descendants after them in a prescribed order, derived from repeated indications in the deed that the line of descent was to be exclusively male though traced from a female head of line; and, lastly, on failure of all his male and female issue, to the younger brothers of the original donee and their respective issue; and it appeared that the original donee had daughters only:—*Held*, that according to the true construction of such prescribed order of succession, notwithstanding the general presumption of Maltese law in favour of the "regular" course of succession, which admits females descended from the last holder in preference to all collaterals, the succession from females was effectively declared to be in lines of "artificial agnation," that is the male line of descendants from a female ancestress through males were intended to take exclusively of females till that male line was exhausted; and consequently that the respondent, the half-brother of the last holder, succeeded in preference to the daughter. — F. also held a barony (established under the Frank princes in Naples and Sicily as a hereditary feud, alienable with the Royal assent), under a settlement of 1674, which limited

MALTA, LAW OF—*continued.*
the same to his descendants generally. By his will he purported to annex the same to the said primogenitura, thereby purporting to impress upon it the character of a majorat descendible to males to the exclusion of females:—*Held*, that assuming that a former settlement of the barony in 1613 did not establish the succession unalterably in favour of the "regular" lineal descent, F. could so annex it to the extent permitted by the Pragmatic of Philip IV., No. 34. Case remitted to the Court below to investigate whether the succession to the barony was still prescribed by the settlement of 1613, notwithstanding the settlement of 1674, and, if not, within what limits the will of F. was operative in regard thereto according to the natural construction of the Pragmatic; unless there be any settled usage or interpretation thereof at variance with its natural construction and so entitled to prevail. D'Amico *v.* Trigona - - - - - 806

MANDAMUS—Election of councillor - 241
See Municipal Corporation.

MANDATORY — Rights of — Law of Lower Canada - - - - 120
See Canada, Law of. 6.

MARINE INSURANCE - - - 160
See Insurance—Marine.

MAXIMS OF LAW—"Qui facit per alium facit per se" - - - - - 1
See Ship. 1.

—— "Respondeat superior" - - 1
See Ship. 1.

MERGER—Easement—Covenant - - 279
See Easement.

MINE—Gold mine—Miners' rights - 227, 238
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—— Purchase of surface by waterworks company—Clay - - - - 657
See Scotch Law. 6.

MISREPRESENTATION—Contract—Rescission
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MORTGAGE—Building society - - 582
See Building Society.

—— Premises destroyed by fire—Rights of second mortgagees - - - - 699
See Scotch Law. 5.

MUNICIPAL CORPORATION—*Election of Councillor — Disqualification — Alderman — Returning Officer—Declaration of Election—Return of Minority Candidate—Mandamus—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 2, *Sched.* 1, *rr.* 45, 46—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 34, 58, 87.] Two candidates, R. and P., were nominated for the vacant office of councillor of one of the wards of a borough. P. objected to R.'s nomination on the ground that R. was disqualified, being an alderman of the borough whose term of office had not expired, but the mayor disallowed the objection. Throughout the election P. insisted upon his objection, and claimed to be elected whatever the result of the poll might be. The votes having been counted, shewed a majority for R., and the returning officer read out the names and numbers to the mayor, who announced them in public. Having taken time to consider the objection the returning officer

MUNICIPAL CORPORATION—*continued.*
on the following day issued a public notice stating the number of votes given to each candidate, and the objection, and declaring P. to be duly elected. P. thereupon made and subscribed the declaration of acceptance of the office required by the Municipal Corporations Act, 1882, ss. 34, 35. R. subsequently made and subscribed a similar declaration:—*Held*, affirming the decision of the Court of Appeal (18 Q. B. D. 349) but without deciding whether an alderman is disqualified for election as councillor, that the returning officer had no jurisdiction to determine the question of disqualification, the proper method for determining that question being an election petition as provided by the Municipal Corporations Act, 1882, s. 87, and the duty of the returning officer being to count the votes and "forthwith to declare to be elected the candidate to whom the majority of votes have been given," as provided by s. 2 of the Ballot Act, 1872; that P. had not been declared to be elected; that the office was not full of him; and that he was not entitled to a mandamus to compel the mayor and corporation to receive his votes at their corporate meetings.—*Reg.* v. *Coaks* (3 E. & B. 249; 23 L. J. (Q.B.) 133) discussed. Pritchard *v.* Mayor, &c., of Bangor - 241

—— Law of Natal—Local government - 478
See Natal, Law of.

MUNICIPAL COUNCIL — Bye-law—New South Wales - - - - 446
See New South Wales, Law of. 3.

NATAL, LAW OF—*Private Act of August* 3, 1866—*Encroachment—Remedy—Jurisdiction of the Court.*] In an action brought by the appellant corporation under sects. 60 and 64 of the Municipal Corporations Act, 1872, to compel the respondent company to remove portions of certain buildings which, by virtue of a survey authorized by a private Act relating to the corporation, and dated the 3rd of August, 1866, must be deemed an encroachment on the street:—*Held*, that the right of resort to the ordinary Courts of Justice was according to the manifest intention of the law of 1866, excluded in reference to all questions resulting from such survey being made binding and conclusive. All such questions must by the terms of the private Act be referred to a Court of Arbitration established thereby. The Act, however, did not apply to future encroachments, nor to encroachments already existing independently of such survey, on the face line of streets as laid down by the corporation under an earlier Act of 1862. Mayor, &c., of Pietermaritzburg *v.* Natal Land and Colonization Company 478

NEGLIGENCE—Carrier—Railway company 31
See Railway Company. 1.

—— Damages—Remoteness - - 222
See Damages.

—— Ship—Collision - - - - 1
See Ship. 1.

—— Trustee—Investments - - - 753
See Scotch Law. 8.

NEWFOUNDLAND, LAW OF — *Contract — Apportionment — Counter-claim for Unliquidated Damages — Set-off against Assignees of the Contract.*] By contract in 1881 embodied in a

NEWFOUNDLAND, LAW OF—*continued.*
statute the plaintiff company covenanted to complete a railway in five years, and thereafter to maintain and continuously operate the same. In consideration thereof the Government covenanted:—(*a*) to pay the company upon the construction and continuous operation of the line an annual subsidy for thirty-five years, such subsidy "to attach in proportionate parts and form part of the assets of the company as and when each five-mile section is completed and operated;"—(*b*) to grant to the company in fee simple 5000 acres of land for each one mile of railway completed, on completion of each section of five miles.—It appeared that the company completed a portion of the line, and received from the Government on the completion of each five-mile section the specified grant of land, and certain half-yearly payments in respect of the proportionate part of the subsidy which was deemed by the parties to attach thereto; thereafter the contract was broken by the company, and the Government refused further payments.—In a suit by the company and its assignees of a division of the railway and of the rights relating thereto:—*Held* (1), that on the true construction of the contract (*a*) each claim to a grant of land was complete from the time when the section which had earned it was complete; (*b*) on the completion of each section a proportionate part of the subsidy became payable for the specified term, but subject to the condition of continuous efficient operation;—(2), that by the law of the Colony the Government were entitled to set-off a counter-claim for unliquidated damages for the company's breach of contract in not completing the line;—(3), that the set-off availed against the assignees of the company, the claim and counter-claim having their origin in the same portion of the same contract, the obligations which gave rise to them being closely intertwined.—*Young* v. *Kitchen* (3 Ex. D. 127) approved. Government of Newfoundland *v.* Newfoundland Railway Company - - - - 199

NEW SOUTH WALES, LAW OF—*Crown Lands Act*, 1884, *s.* 4, *and s.* 21, *sub-s.* 3—*Conditional Purchase forfeited—Crown Lands.*] The defendant having applied for a grant, partly on conditional purchase and partly on conditional lease, of portions of land within the external boundaries of the plaintiff's leasehold area, as determined by the Minister of Lands, under the Crown Lands Act of 1884, it appeared that the said portions had prior to that Act been conditionally sold by the Government and subsequent to the Act forfeited by the purchaser:—*Held*, that the said portions of land did not on such forfeiture become part of the pastoral leasehold but became Crown lands within sect. 4 of the Act and could be validly regranted by the Crown on conditional purchase or conditional lease. Tearle *v.* Edols [183

2. —— *Limitation Act* 3 *of* 1837—*Act ceases to run against lawful Owner when Intruder relinquishes possession.*] The English Limitation Act (3 & 4 Will. 4, c. 27), adopted by New South Wales Act No. 3 of 1837, does not continue to run against the rightful owner of land after an intruder has relinquished possession without

NEW SOUTH WALES—LAW OF—*continued.*
acquiring title under the Act. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the intrusion took place. The Act applies not to want of possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. AGENCY COMPANY *v.* SHORT [793

3. —— *Municipalities Act*, 1867, *s.* 153—*Validity of Bye-law—Unreasonableness.*] *Held*, that a bye-law made in pursuance of sect. 153 of the Municipalities Act, 1867, empowering municipal councils to make bye-laws for regulating the interment of the dead is not ultra vires, by reason of its prohibiting interment altogether in a particular cemetery and thereby destroying the private property of the owners of burial places therein.—*Quære*, whether and under what circumstances bye-laws can be set aside as unreasonable. SLATTERY *v.* NAYLOR - - - 446

4. —— *Voluntary Conveyance irrevocable—Subsequent Purchaser for Value*—13 *Eliz. c.* 5—27 *Eliz. c.* 4—*New South Wales District Courts Act*, 1858, *ss.* 78, 79.] Where a debtor conveyed all his real estate upon trust to sell and pay off his debts, and as to any ultimate surplus to pay the same to trustees to be held by them in trust for the separate use of his wife for life, and after her decease in trust for their children in equal shares as tenants in common:—*Held*, in a suit by a subsequent purchaser for value (at a sale in execution) of the grantor's interest in some lands comprised in the conveyance:—(1.) That the deed of conveyance was not revocable, there being an ultimate trust for the benefit of the wife and children; (2.) That it was not void as intended to delay or defeat creditors; (3.) That, not being fraudulent in fact, it was not fraudulent in law and void against creditors under 13 Eliz. c. 5, no intention to delay or defeat creditors being shewn; (4.) That it was not void under 27 Eliz. c. 4, as against a purchaser for value under New South Wales District Courts Act, 1858, ss. 77 & 78. The subsequent sale for value not being by the voluntary grantor, no presumption arose that the prior grant was fraudulent. GODFREY *v.* POOLE 497

ONTARIO, LAW OF - - - 136, 800
See CANADA, LAW OF. 1, 2

PARTNERSHIP—Contract—Rescission - 308
See CONTRACT. 2.

—— Law of Lower Canada - - - 788
See CANADA, LAW OF. 4.

PASSENGERS' LUGGAGE - - - 31
See RAILWAY COMPANY. 1.

PATENT—*Infringement admitted—Action for Damages—Quantum of.*] In an action by the pursuers, who were assignees of a patent for the manufacture of horse-shoe nails, for damages caused by the infringement of the patent, it appeared that the pursuers did not grant licences, but themselves manufactured and sold the nails made by their patented machinery, and it was admitted that a number of boxes of nails manufactured in such a manner as to infringe the patent had been sold by the defenders:—*Held* (reversing the decision of the Court of Session),

PATENT—*continued.*
that to the extent by which their trade was injured by the defenders' sales the pursuers were entitled to substantial damages; that the measure of damage was the amount of profit which they would have made if they had themselves effected such sales, deducting a fair percentage in respect of sales due to the particular exertions of the defenders, and that the mere possibility that the defenders might have manufactured and sold an equal quantity of similar nails without infringing the patent was no ground for reducing the damages to a nominal sum:—*Held* further, that the fact that the pursuers had in consequence of the unlawful competition of the defenders reduced the price of nails which they had themselves sold did not entitle them to recover additional damages in respect of the reduction in the profits of such sales. UNITED HORSE-SHOE AND NAIL COMPANY *v.* STEWART & CO. - - - - 401

PAUPER—Appeal by - - - 371
See PRACTICE. 2.

POOR-RATE—*Rateable Value—Assessment of Railway Line—Line leased by Railway Company, Mode of assessing*—6 *&* 7 *Will.* 4, *c.* 96, *s.* 1.] The special case stated by the arbitrator (18 Q. B. D. 740) remitted to him to find upon the facts the proper value of the tenements, no question of law for the decision of a Court being raised by the case in its present shape. NORTH AND SOUTH WESTERN JUNCTION RAILWAY COMPANY *v.* ASSESSMENT COMMITTEE OF THE BRENTFORD UNION - - - - - - 592

POWER—Objects of—Issue then in being 294
See SETTLEMENT.

PRACTICE—*House of Lords—Divorce—Personal Service out of the Jurisdiction—Affidavit of Service—Statute* 18 *&* 19 *Vict. c.* 42.] The respondent in a divorce bill being out of the jurisdiction and the petitioner in poor circumstances, the House dispensed with the attendance at the bar of a witness to prove personal service of the bill and the several orders of the House on the respondent; and ordered that an affidavit proving such personal service, and sworn under 18 & 19 Vict. c. 42, before the British minister or consul at the place where the respondent resided, should be deemed sufficient proof of such service. JOYNT'S DIVORCE BILL - - - - 741

2. —— *House of Lords—Appeal—Petition to appeal in formâ pauperis—Question respecting alleged Public Right.*] Upon a petition for leave to prosecute an appeal in formâ pauperis it appeared that the petitioner sought as one of the public to establish a right of fishing in a tidal river adjoining land belonging to the defender, and that subscriptions had been collected to assist the petitioner in the litigation:—*Held*, that in the circumstances the application could not be granted. BOWIE *v.* MARQUIS OF AILSA - 371

3. —— *Privy Council—New Trial—Verdict of Jury properly found must stand.*] Where there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand.—So *held*, reversing an order of the Court below which had set aside a verdict as against the weight of evidence, though it was neither

PRACTICE—*continued.*
unreasonable nor unfair, nor dissented from by the judge who tried the case. Commissioner for Railways *v.* Brown - - - - 133

4. —— *Privy Council — Right to appeal — Decree below the appealable Amount.*] The measure of value for determining a defendant's right of appeal is the amount which the plaintiff has recovered; where this falls short of the appealable amount, the Court below cannot give leave to appeal. Where such leave has been erroneously given, the appeal will be dismissed, and an opportunity to apply for special leave will not be granted unless the circumstances are such as to render it desirable. Allan *v.* Pratt - 780

5. —— *Privy Council—Special Appeal—Improper Concealment of material Facts in the Petition—Judge's Notes of Evidence.*] Where judge's notes of evidence are mere private memoranda, and are not taken in pursuance of any law or practice requiring them, *held*, that it would be improper to have them before a Court of Appeal. —Where an order granting special leave to appeal had been made upon a petition which improperly concealed from their Lordships the ground upon which the appeal had been refused by the Court below, *held*, that a subsequent petition that further evidence be taken must be refused, as nothing will be done to assist an appeal so instituted. Baudains *v.* Liquidators of Jersey Banking Company. *Ex parte* Baudains - - - - - - 832

6. —— *Supreme Court—Interpleader—County Court Appeal—Appeal from Divisional Court to Court of Appeal — Jurisdiction of Court of Appeal* — 13 & 14 *Vict. c.* 61, *s.* 14—19 & 20 *Vict. c.* 108, *s.* 68—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *s.* 20.] Interpleader proceedings were transferred under the Judicature Act, 1884, s. 17, from the Queen's Bench Division to a county court. On appeal from the judgment of the county court the Queen's Bench Division affirmed that judgment, but gave leave to appeal to the Court of Appeal:—*Held*, that the Court of Appeal had jurisdiction under the Judicature Act, 1873, s. 45, to hear the appeal, that jurisdiction not having been taken away by the Appellate Jurisdiction Act, 1876, s. 20.—The decision upon this point in *Crush* v. *Turner* (3 Ex. D. 303) approved. Thomas *v.* Kelly - - 506

PRESUMPTION — Culpability — Collision — Infringement of sailing regulations 454, *See* Ship. 2, 3. [455, n.

PRIORITY—Mortgage—Building society 582
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PROFITS—Deductions from - - 418
See Income Tax.

PUBLIC RIGHT—Appeal in formâ pauperis 371
See Practice. 2.

PURCHASER FOR VALUE—Voluntary conveyance - - - - - 497
See New South Wales, Law of. 4.

QUEBEC, LAW OF - - 120, 467, 770, 788
See Canada, Law of. 3, 4, 5, 6.

QUEENSLAND, LAW OF—*Gold Fields Act*, 1874, *ss.* 9, 11—*Holders of Miners' Rights—Rights of Crown Lessees.*] In an action by the holders of "miners' rights" issued to them under the Gold Fields Act, 1874, and regulations made thereunder, to set aside the defendants' mining leases also thereunder granted on the grounds (1) that they had been granted contrary to sect. 11 within two years from the proclamation of the goldfield within which the leased areas were contained; (2) that the formalities prescribed by the regulations had not been observed by the defendants when applying therefor:—*Held*, that neither under the Act nor otherwise had the plaintiffs any right to interfere with the lessees' possession. Sect. 9 gave them no rights whatever as against lands let by the Crown, and no title to try the validity of Crown leases relating thereto; and the whole tenor of the regulation is opposed to such contention. Osborne *v.* Morgan - 227

2. —— *Gold Fields Act*, 1874, *ss.* 9, 11 — *Holders of Miners' Rights—Rights of Crown Lessees.*] In an action for substantially the same purpose as in the last preceding case, but with the additional allegation that the plaintiff had before action with the view of fortifying his title gone to the leasehold area for the purpose of taking possession of parcels of ground within it, and of working them as claims, but was prevented by the defendants:—*Held*, that this made no difference, as such proceedings were unauthorized by the Act, and could not set up a defective title. Williams *v.* Morgan - - - 238

RAILWAY COMPANY—*Common Carriers—Passengers' Hand-Luggage—Delivery to Porter—Negligence.*] The female respondent arrived at the Paddington Station of the appellants' railway at 4.20 P.M. on Christmas Eve with a bag and two other articles of luggage, in order to travel by the 5 P.M. train. A porter labelled the two articles and took all the luggage to the platform, the train not then being at the platform. The female respondent told the porter she wished the bag to be put into a carriage with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe and that he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. Ten minutes after she had left the luggage she and her husband returned together to the platform and found that the two labelled articles had been put into the van of the train, but that the porter and the bag had disappeared. In an action in the county court against the railway company for the loss of the bag the judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the porter was guilty of negligence in not being in readiness to put the bag into the carriage when the female respondent returned, and held the company liable:—*Held*, by Lord Halsbury, L.C., and Lords Watson, Herschell, and Macnaghten (Lord Bramwell dissenting), that there was evidence upon which the county court judge might reasonably find, first, that the bag was in the custody of the railway company for the purposes of present and not of future transit

RAILWAY COMPANY—*continued.*
from the time when it was delivered to their porter until its disappearance, and secondly that its loss was due to their negligence:—*Semble*, by Lord Halsbury, L.C., and Lords Watson, Herschell and Macnaghten (Lord Bramwell dissenting), that a railway company accepting passengers' luggage to be carried in a carriage with the passenger, enter into a contract as common carriers, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory.—The decision of the Court of Appeal (17 Q. B. D. 215) affirmed.—The reasoning in *Bergheim* v. *Great Eastern Railway Company* (3 C. P. D. 221) disapproved. Great Western Railway Company *v.* Bunch - - 31

2. —— *Tolls—Lien of Railway Company—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 3, 97.] A railway company claimed under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 97, to detain wagons belonging to the respondents for tolls due from the B. Company for the carriage of goods in the wagons:—*Held*, affirming the decision of the Court of Appeal, that the claim could not be sustained under the earlier or the later part of sect. 97: not under the later, because the wagons did not belong to the persons from whom the tolls were due; not under the earlier, because that part of the section does not entitle a railway company to detain wagons for tolls due only in respect of the goods carried in such wagons. Manchester, Sheffield, and Lincolnshire Railway Company *v.* North Central Wagon Company - - - - - 554

—— Law of Canada - - - 136, 467
See Canada, Law of. 2, 5.

RAILWAY LINE—Rateable value - - 592
See Poor-rate.

RATEABLE VALUE - - - - 592
See Poor-rate.

RATIFICATION—*Illegality of the Transaction—Absence of full Knowledge.*] Acquiescence and ratification must be founded on a full knowledge of the facts, and further, it must be in relation to a transaction to which effect may be given thereby.—Where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for his own purposes:—*Held*, overruling the Court below, that the doctrine of acquiescence and ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed. La Banque Jacques-Cartier *v.* La Banque d'Epargne de la Cité et du District de Montreal - - - - - - 111

REGISTRATION—Bill of sale—Law of Trinidad
See Trinidad, Law of. [489

REMOTENESS—Damages - - - 222
See Damages.

RESCISSION—Contract—Partnership - 308
See Contract.

REVERSION—Infant's marriage settlement 61
See Infant.

SAILING REGULATIONS - - 454, 455, n.
See Ship. 2, 3.

SCOTCH LAW—*Award—Compensation—Waterworks—Interests injuriously affected—Value of Water enhanced by Embankments—Award apparently ambiguous, explained.*] The appellant granted to D. certain mills on a stream forming the outlet to two lochs nearly surrounded by his property, with his "whole rights of water and water power connected with the said mills;" "reserving" all his "rights in the lochs" and stream "except the rights therein connected with the mills." The storage capacity of the lochs had been increased by embankments made within the appellant's ground. The respondents, who were waterworks commissioners under a special Act, acquired by agreement the rights of D. in the water, and under their compulsory powers took from the appellant a small piece of ground and a wayleave for a pipe, which they inserted in the stream and diverted the waters of the lochs to supply a town. Sect. 9 of the special Act provided that a certain quantity of water sent down the stream daily should be held to be a sufficient compensation to the mill-owners and others. Sect. 10 reserved, inter alia, any rights the appellant had in Loch Humphrey. In a claim for compensation the arbitrator found the appellant entitled (1) to £50 for the land and wayleave; and (2) "In the event of it being determined that the appellant had retained any right or interest in the waters of the lochs and the streams or any of them, and that he is now entitled to compensation in respect of such right or interest, I find £3000 to be the amount to be paid" in respect of the right or interest to be acquired from the appellant "in the foresaid waters and the embankments" at the lochs, "including in the said sum of £3000 the sum of £1650 as the estimated price or value of the embankments:—*Held*, reversing the decision of the Court of Session (13 Court Sess. Cas. 4th Series, 636), that the award was valid, inasmuch as the arbitrator had valued only one thing, the enhanced value of the water in the lochs, and had not valued, as a separate subject, the embankments, but had properly included in the £3000, as a factor of value, the incidental right obtained by the respondents to have the embankments left standing. Lord Blantyre *v.* Babtie - - - - - 631

2. —— *Husband and Wife—Contract of Marriage—Infant domiciled abroad—Exclusion of Terce and Jus Relictæ—Application of English Law—Evidence—Absence of Proof of English Law—Judicial Notice by House of Lords.*] The appellant, the widow of a domiciled Scotchman, brought an action in the Court of Session for the reduction of an ante-nuptial contract by which in consideration of a provision made by her husband she purported to discharge her legal rights of terce and jus relictæ. The contract was executed in Ireland by the appellant, who was then an infant domiciled in Ireland, but it was contemplated that she and her husband should reside, and they actually resided, during their married life in Scotland. The grounds upon which the appellant sought to obtain reduction of the contract were, that being an infant she was incapable of contracting by the law of Ireland, and minority and

SCOTCH LAW—*continued.*

lesion according to the law of Scotland, but no evidence was adduced before the Court of Session as to the Irish or English law with regard to the capacity of an infant to enter into contracts:—*Held*, first, that notwithstanding the absence of such evidence in the Court below, the wife's incapacity according to Irish law being a substantial ground of reduction on the record, it was competent for the House on appeal to take judicial notice of the English law prevailing in Ireland. Secondly, that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of her domicil (i.e., the Irish or English law), and that under such law she could not as an infant incur an obligation which was not shewn to be for her benefit, and that she was therefore at liberty to avoid the contract and claim her legal rights as a Scotch widow. Cooper *v.* Cooper - - - - - - 88

3. —— *Husband and Wife—Post-nuptial Settlement by Husband—Wife's Assent to Life-rent Provision—Jus relictæ.*] A testator, between whom and his wife there was no ante-nuptial contract, by the third purpose of his settlement, directed his trustees to pay over the whole annual income of his estates to his wife for her life; and by the fourth purpose, "after the death of the longest liver of me and my wife to convert into money all my estate and with her consent and full approbation (in token of which she has subscribed this deed) to pay" (certain legacies). The deed contained no express discharge of the wife's terce and jus relictæ; and it reserved a power to the testator to alter or revoke. The wife signed the deed without any limitation being attached to her signature in the testing clause. She survived the testator for two months, but was incapable of transacting any business during that period:—*Held*, affirming the decision of the Court of Session (11 Ct. Sess. Cas. 4th Series, 996) that although the wife's consent to the deed could not be carried beyond the fourth purpose, except so far as it necessarily implied approval of the other purposes, yet the fourth purpose and the antecedent provision of life-rent in the third purpose were so intimately connected that the wife must be held to have accepted the provision, and therefore, although the wife had the power to revoke her consent, her representatives had not, and their claim to her terce and jus relictæ was untenable. Edward *v.* Cheyne (No. 1) - 373

4. —— *Husband and Wife—Separate Estate—Receipt of Income by Husband—Presumption of Gift—English and Scotch Law.*] By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, and reclaiming the subject of her gift in so far as it has not been consumed.—The same circumstances which are in England held to imply donations between husband and wife are sufficient to sustain a similar inference in Scotland.—A married woman living with her husband in Scotland was entitled to the income of a fund settled for her separate use, which stood in the names of trustees of whom her husband was one; and he also acted

SCOTCH LAW—*continued.*

as factor of the trust.—Payments of income were at first lodged in a bank to the credit of the wife's separate account, then to the credit of an account in the names of both husband and wife; but for many years previous to the husband's death, both before and after he became sole trustee, the income was paid into the husband's private banking account, and mixed with his own funds:—*Held*, affirming the decision of the Court of Session (13 Court Sess. Cas. 4th Series, 1209) that these circumstances inferred a complete gift; and, in respect it had not been revoked by the wife, that her representatives were not entitled to an account of the husband's intromissions with her separate estate. Edward *v.* Cheyne (No. 2) - 385

5. —— *Insurance, Fire — Claim by postponed Bondholder for Loss after Payment of a sufficient Sum to reinstate has been made to prior Bondholders by other Insurers—Rent of mortgaged Premises—Act* 14 *Geo.* 3, *c.* 78, *s.* 83.] The pursuers having a heritable security by bond on certain premises insured them against fire in the defender's office for £900. Prior securities had been given by the owner upon the same premises to other creditors, and those creditors had insured in other offices. The premises having been in part destroyed by fire, the prior incumbrancers recovered from and were paid by the offices in which they were insured an amount sufficient for the re-instatement of the premises, and for the payment of the rent during the period of re-instatement, but the premises were not in fact re-instated. It appeared that immediately before the date of the fire the value of the premises was sufficient to cover the prior bonds and that of the pursuers, but in consequence of the fire the value of the premises was so reduced that they were not sufficient to meet the balance remaining due to the prior creditors, and the pursuers' bond was left entirely uncovered:—*Held*, affirming the judgment of the Court of Session (14 Court Sess. Cas. 4th Series, 947) that the pursuers were entitled, notwithstanding the amount paid to the other creditors, to recover to the full extent of their loss.—But *held*, reversing the judgment of the Court of Session, that the pursuers were not entitled to recover anything in respect of the loss of rent of the premises after they had been damaged by fire.—*Semble, per* The Earl of Selborne and Lord Watson, that 14 Geo. 3, c. 78, s. 83, relating to the application of insurance money on houses destroyed by fire, does not extend to Scotland. Westminster Fire Office *v.* Glasgow Provident Investment Society - - - - - 699

6. —— *Mines and other Minerals—Compulsory Purchase of Surface—Whether Clay is included in "other Minerals"—Waterworks Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 17)—*Scotch Railways Clauses Act* (8 *&* 9 *Vict. c.* 33), *s.* 70—*English Railways Act* (8 *&* 9 *Vict. c.* 20), *s.* 77.] The 18th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." The appellants, by virtue of the Act and a conveyance containing a reservation of the "whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847,"

SCOTCH LAW—*continued.*
purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants' boundary, claimed the right to work out the clay under the land purchased by the appellants:—*Held*, reversing the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 346) (Lord Herschell dissenting), that common clay, forming the surface or subsoil of land, was not included in the reservation in the Act, and that the appellants were entitled to an interdict restraining the respondent from working the clay under the land purchased by them. Lord Provost and Magistrates of Glasgow *v.* Farie - - 657

7. —— *Right of Way—Thinly-populated District—Evidence of User.*] In an action claiming a public right of way over a track or natural mountain pass about fourteen miles long, running through a thinly-populated district of the Highlands of Scotland and connecting by the shortest route Braemar and Clova, it appeared from the evidence of user that the track in question had been used by the public on foot; by drovers twice a year driving sheep from a market held at Braemar to one held near Clova; that public subscriptions had been collected for a bridge in line of the track; that some distance up the disputed track there was an old milestone, and that a proprietor in planting trees had specially left a space for the track:—*Held*, affirming the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 875), that the amount of user, having regard to the character of the district, was such as might have been expected if the track had been admittedly a public way and not the subject of mere tolerance, and that the evidence was sufficient to establish the right of way. Macpherson *v.* Scottish Rights of Way and Recreation Society [744

8. —— *Trustee—Investment—Loan on Trade Premises and Personal Security—Negligence—Power to lend on "Heritable and Personal" Security—Immunity Clause—Law Agent acting for both Lender and Borrower.*] Trustees sold a tenement, the property of the trust, to one of seven beneficiaries under the trust deed, the price in terms of the contract being payable in May, 1874. In November, 1874, the purchaser being unable to pay £12,000 of the price, was allowed to retain it on loan. As security for the loan, he conveyed to the trustees three houses, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two-thirds of the estimated value as stated by the borrower. Besides these securities the trustees held the personal obligation of the borrower and his father-in-law: both of whom were engaged in trade. Some of the other beneficiaries remonstrated in 1874, and again in 1880; but the money was allowed to remain on these securities until 1884, when the borrower and his father-in-law became bankrupt, and about £10,000 was lost to the trust. The trust deed contained (1) a clause empowering the trustees to lend out the proceeds and other funds of the trust on "such securities heritable or personal" as they might think proper; and (2) an immunity clause declaring that the trustees should not be liable for "omissions, errors, or neglect of management." The same law agent acted for the trustees and the borrower:—*Held*, affirming the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 22), that the trustees had not acted with perfect impartiality between the beneficiaries, nor had they brought to the management the same care and diligence which a man of ordinary prudence would have exercised in his own concerns, that in these circumstances neither the immunity clause nor the authority to lend on personal security were sufficient to protect them, and that they were personally liable to make good the deficiency in the trust funds. Knox *v.* Mackinnon - - - - - - 753

9. —— *Warrandice—Liability of Executor—Disposition with Warrandice Clause—Heir and Executor—Residue—Catholic Security—Act 31 & 32 Vict. c. 101, s. 8.*] The grantor, by a disposition mortis causa dated 1853, conveyed his whole heritable and movable estate to trustees for the purpose (inter alia), failing heirs of his own body, of conveying his estate of M. and his other lands in the county of Lanark to his brother under a strict entail.—By codicil, dated 1876, and soon after his marriage, the testator disponed to his wife, in the event of her surviving him, the lands of B. and A., directing these lands to be excepted out of the lands directed by the deed of 1853 to be entailed; and bequeathed to her the whole residue of his estate. By a previous deed he appointed his wife as his sole executrix. The disposition of B. and A. to the wife contained a clause of warrandice in ordinary form under the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, sect. 8, sch. B.), which under sect. 8 imports an absolute warrandice. In 1882 he granted a bond and disposition in security for £250,000 over the estates of "M.," "B." and "A."—On the grantor's death his widow claimed that no part of the debt of £250,000 was payable out of B. and A. or out of residue, but that the whole debt was entirely chargeable against "M.":—*Held*, affirming the decision of the Court of Session (14 Court Sess. Cas. 4th Series, 131), that the testator had in imposing the obligation of warrandice used words limited in their significance to personal obligation, and that his widow as personal representative and executrix must herself discharge the obligation of warrandice. Dowager Duchess of Montrose *v.* Stuart 81

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SETTLEMENT—*Construction—Power of Appointment—Objects of Power—"Issue then in being"—Vesting of Estate, Time of.*] By a settlement made on his marriage, the settlor granted freehold lands to trustees upon trust for himself for life and after his death to convey the lands and

SETTLEMENT—*continued.*

pay the rents and profits "unto or for the benefit of all and every or any one or more child or children, or any grandchild or grandchildren or other issue *then in being* of the said intended marriage" for such estate or interest and in such shares and subject to such conditions as the settlor should by deed or will appoint.—There was issue of the marriage several children, who all attained twenty-one. The settlor appointed a portion of the lands to his eldest son, then of age, his heirs and assigns, and joined with him in mortgaging this portion. The son having died in his father's lifetime:—*Held*, affirming the decision of the Irish Court of Appeal (*In re Leader's Estate*, 17 L. R. Ir. 279), but without deciding any question upon general rules of construction, that upon the true construction of the settlement the words "then in being" governed only the words "grandchild or grandchildren or other issue," and not the words "child or children;" that the appointment was therefore valid, and that the fee passed under the mortgage. Leader *v.* Duffey - 294

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SHIP—*Collision — Damages for Loss of Life— Negligence in both Ships—Liability of Owners of one Ship to Passengers and Crew of the other Ship —Maxims, "Qui facit per alium facit per se," "Respondeat superior"—Admiralty Rule as to half Damages in Collision—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.] A collision having occurred between the steamships *Bushire* and *Bernina* through the fault or default of the masters and crews of both, two persons on board the *Bushire*, one of the crew and a passenger, neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought in the Admiralty Division actions in personam against the owners of the *Bernina* for negligence under Lord Campbell's Act (9 & 10 Vict. c. 93):—*Held*, affirming the decision of the Court of Appeal (12 P. D. 58), that the deceased persons were not identified in respect of the negligence with those navigating the *Bushire;* that their representatives could maintain the actions; and could recover the whole of the damages, the Admiralty rule as to half damages not being applicable to actions under Lord Campbell's Act.—*Thorogood* v. *Bryan* (8 C. B. 115) and *Armstrong* v. *Lancashire and Yorkshire Railway Company* (Law Rep. 10 Ex. 47) overruled. Mills *v.* Armstrong. The "Bernina" - - - - - 1

2. —— *Collision — Maritime Regulations, Section III., Articles* 3 (*b*) *and* 5—*Presumption of Culpability.*] Where a ship carried a bright light of such a character as to be visible at three miles distance, which though fixed in the rigging was not shewn to have been intercepted by the clew of the foresail or otherwise:—*Held*, there was no breach of maritime regulations, articles 3 (*b*) and 5 of section III., and therefore no presumption of culpability on the part of such ship, according to the principle laid down in the *Fanny M. Carvill* (13 App. Cas. 455, n.) as contributing to the

SHIP—*continued.*

collision in respect of which she sued.—Where the plaintiffs in an action for damage to cargo had indorsed their bills of lading to the bank to secure advances:—*Held*, that they retained an interest in the cargo sufficient to enable them to maintain their suit, the money recovered to be for the benefit of the parties shewn to be entitled thereto. The "Glamorganshire" - 454

3. —— *Collision — Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Construction— Art.* 3 *of Regulations for preventing Collisions— Infringement.*] By the true construction of the Merchant Shipping Act, 1873, sect. 17, a British ship cannot be pronounced in fault merely by reason of its non-observance of a maritime regulation. A presumption of culpability in case of collision thence arises, but such presumption may be met by proof that the infringement could not by any possibility have contributed thereto.—Where a ship infringed art. 3 of the Sailing Regulations by carrying her side lights with screens shorter than the length prescribed thereby, but it was proved that such breach of the Regulation could not possibly have contributed to the collision:—*Held*, that the ship could not be deemed to be in fault. The "Fanny M. Carvill" [455, n.

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27 Eliz. c. 4 (*Fraudulent Conveyances*) - 497
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STRAITS SETTLEMENT, LAW OF—*Crown Suits Ordinance of* 1876, *sect.* 18, *sub-s.* 2—*Crown liable in Tort—Right of Access to the Sea.*] On a petition of right against the Government for damages done to the petitioner's tenement by the execution of reclamation and other works upon the foreshore in front of it:—*Held* (*a*), that the petitioner by virtue of his tenement had the same right of access to the sea as a riparian proprietor has in respect to a tidal river.—(*b*) That under the Crown Suits Ordinance of 1876, sect. 18, sub-s. 2, the Crown could be sued in tort. Attorney-General of the Straits Settlement *v.* Wemyss [192

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TITHES—*Non-payment of Tithes—Limitation—City of London Tithes*—37 *Hen.* 8, *c.* 12—*Tithe Prescription Act*, 2 & 3 *Will.* 4, *c.* 100, *s.* 1—*Statute of Limitations*, 3 & 4 *Will.* 4, *c.* 27, *ss.* 1, 2.] The statute and decree of 37 Hen. 8, c. 12, provided that the inhabitants of the city of London for the time being should yearly for ever pay their tithes in respect of their houses after certain rates. A lay impropriator of the tithes in a parish within the City having brought an action to recover from the inhabitants of certain houses within the parish tithes payable under this statute, it appeared that (so far as was known) no tithes or payments in lieu of tithes had ever been paid in respect of those houses:—*Held* first, upon the authority of *Andrews* v. *Drever* (3 Cl. & F. 314) that (apart from statute) mere non-payment afforded no defence even against a lay impropriator:—*Held* secondly, that the payments imposed by 37 Hen. 8, c. 12, were not a render of tithes in kind within the meaning of the Tithe Prescription Act, 2 & 3 Will. 4, c. 100, s. 1, and that that Act afforded no defence;—*Held* thirdly, that the payments imposed by 37 Hen. 8, c. 12, were "annuities or periodical sums of money charged upon land" within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 1, and that that statute (as amended by 37 & 38 Vict. c. 57) afforded a defence to the action. Payne *v.* Esdaile - - 613

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TRINIDAD, LAW OF—*Ordinance No.* 15 *of* 1884—*Bill of Sale of growing Crops—Registration.*] *Held*, that a bill of sale of crops actually growing at the date of its execution is void for want of registration under Trinidad Ordinance, No. 15 of 1884. The words in sect. 10 "nothing contained in this Ordinance" mean "nothing contained in the two next preceding sections of this Ordinance. Tennant *v.* Howatson - 489

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WILL—*Construction—Die without leaving lawful Issue.*] Where a testator, after making particular dispositions during the lifetime of his widow, and certain absolute dispositions in favour of his children to be effected by conveyance from the trustees of the will at her decease, directed that "if any of my said children shall die without leaving lawful issue them surviving the property hereby devised and bequeathed to each of my said children shall be equally divided amongst my surviving children":—*Held*, that, according to the whole scope and intention of the will, the time of dying without lawful issue was confined to the time before the grant of the absolute interest, that is during the lifetime of the widow; and that after conveyance of the absolute interest, no defeasance was contemplated. Lewin *v.* Killey - - - - - - 783

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